Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Petitioners,

vs.

BELTMAN NORTH AMERICAN CO., INC. and
NORTH AMERICAN VAN LINES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a jury, after finding that a common carrier acted with such morally culpable conduct and wanton dishonesty as to imply criminal indifference to their civil obligations under a contract to transport household goods subject to the Carmack Amendment to the Interstate Commerce Act of 1887, may award punitive damages under the federal common law tort of breach of the implied covenant of good faith and fair dealing.

2. Whether, notwithstanding the Carmack Amendment's proviso that its remedies are in addition to those existing at common law, Congress has expressly regulated the entire field of interstate shipping so as to preempt federal common law.

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IN THE
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DONALD L. CLEVELAND AND
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BELTMAN NORTH AMERICAN CO., INC. AND
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Donald L. Cleveland and Christa A. Cleveland respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit on this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A 1) is reported at 30 F. 3d 373. Two opinions of the district court are reported. One at 199 U.S. Dist. LEXIS 1635 (N.D.N.Y. 1992) 2 (App., *infra*, A 20) and the other at 154 F.R.D. 37 (N.D.N.Y. 1994) (App.,*infra*, A 114). The remaining opinions of the district court (App., *infra*, A 54, A 73, A 76, A 95, and A 109 are unreported.

JURISDICTION

The court of appeals entered its judgment on July 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the 1906 Carmack Amendment to the Interstate Commerce Act of 1887 which, in relevant part, was recodified in 1978 as follows:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law. 49 U.S.C. § 10103.
>
> * * *
>
> The Interstate Commerce Commission may require or authorize a carrier ... providing transportation or service subject to its jurisdiction ... to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by written agreement, when that value would be reasonable under the circumstances surrounding the transportation. 49 U.S.C. § 10730(a).
>
> * * *
>
> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission ... shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier ... and any other common carrier that delivers the property and

> is providing transportation or service subject to the jurisdiction of the Commission ... are liable to the person entitled to recover under the bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States ... when transported under a through bill of lading ... 49 U.S.C. § 11707(a)(1).

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves a married couple whose household belongings, after being transported by a common carrier from Iowa to New York, were found to be badly damaged. When settlement of the damage claim could not be reached, petitioners commenced litigation. After trial, a jury awarded petitioners $28,000 in compensatory damages and $50,000 in punitive damages.

Petitioners' household goods were damaged during transportation with a common carrier subject to the jurisdiction of the

Interstate Commerce Commission under 49 U.S.C. § 10521, giving rise to a claim under 49 U.S.C. § 11707 (The Carmack Amendment). The jurisdiction of the district court was invoked under 49 U.S.C. § 11707 (a)(2)(b) which permits civil actions brought under the Carmack Amendment to be brought in United States District Court. The district court also had jurisdiction under 28 U.S.C. § 1331, there being a federal question as the civil action arises under a law of the United States, and under 28 U.S.C. § 1332 because of diversity of citizenship, the petitioner being a citizen of New York and the respondents being citizens of Iowa and Indiana.

The underlying issue in this petition is whether, the conduct of a common carrier which rises to the level of criminal indifference to the rights of the shipper,

falls within the scope of the Carmack Amendment such that a jury's award of punitive damages on a shipper's federal common law tort claim for breach of the implied covenant of good faith and fair dealing must be overturned.

B. STATEMENT OF FACTS

Petitioners contracted with North American Van Lines (North American) and Beltman North American Co., Inc. (Beltman), North American's local agent in Des Moines, to move their household goods and furnishings from West Des Moines, Iowa to Slingerlands, New York in August, 1988. North American and Beltman (respondents) are common carriers as that term is defined by the Interstate Commerce Act, 49 U.S.C. § 10102(4).

During the course of contract negotiations, petitioners told Beltman's salesperson, that they wanted an all-risk

transit replacement cost coverage insurance policy, in the event any damage occurred to their household goods during shipment. In response, Beltman recommended that petitioners purchase, for an additional premium, North American's Replacement Cost Protection Plan ("RCP") which was represented to be insurance coverage even though Beltman's salesperson knew that the RCP plan was not insurance. For an additional $320 petitioners purchased the supplemental protection from North American and it was incorporated into the shipping contract, commonly referred to as the bill of lading.

Interstate Commerce Commission ("ICC") regulations provide that whenever an estimate for service is made by a carrier, several documents explaining the carrier's past performance and the mover's rights and responsibilities must be provided to the

shipper. 49 C.F.R. § 1056.2. Petitioners never received any of the required documents prior to contracting for the move. Beltman's salesman admitted that he had several chances to obtain the petitioners' written acknowledgment that he had provided the documents to petitioners but didn't do so. One of these key documents, Your Rights and Responsibilities When You Move, was not provided by respondents until ten months after the move and not until after suit was filed.

Petitioners' household goods were loaded onto respondents' tractor trailer on August 19, 1988 and, instead of proceeding to New York for delivery on the guaranteed date of August 24, 1988, was driven to Beltman's storage lot in Des Moines where it sat for several days. It was then reloaded onto another tractor trailer and driven to New York where it arrived six days late and in

damaged condition on August 30, 1988. Beltman knew on August 18, 1988 that there was no through driver to drive the load to New York. Despite ICC regulations which require a carrier to notify a shipper as soon as it becomes apparent that a load will be delayed, no notice of delay was given to petitioners.

In addition, shipping documents designed to protect the shipper's interests and necessary to establish a claim for lost or damaged goods during shipment were withheld from petitioners during loading and shipping. For example, the "Item Check Off Sheet" should have been given to the petitioners to check items as they came off the truck not retained by the driver. When copies were finally made available to petitioners, they were unreadable. Once petitioners realized that their goods had been substantially damaged, the

petitioners struck a line through the acknowledgment that the goods were received in good order and wrote a disclaimer.

The record shows that the petitioners load was not loaded in a commercially acceptable manner and that the driver failed to pad most of the load because he ran out of pads. The tractor carrying petitioners' goods was also involved in an accident which tore a hole in the floor of the trailer resulting in rain water soaking most of the cargo.

Petitioners immediately notified respondents of the arrival of their household goods in a damaged condition on August 30, 1988. Even though the Cleveland Claim was very "extensive" and had damaged items that would normally qualify the claim for "Priority" handling, respondents assigned the claim on a "regular" basis and for inspection only.

Petitioners' first written claim was submitted to respondents on September 13, 1988. Supplemental claims were submitted as missing items were discovered including lost business and financial records. Under the bill of lading claims may be filed for lost or missing items up to nine (9) months after the move.

Between August 1988 and February 1989 petitioners were in contact with respondents regarding whether and when a complete settlement of their claim would be made. On February 14, 1989 petitioners received respondents' unilateral offer of settlement of petitioners' entire claim for $9,824.96, approximately one-third of the final amount of compensatory damages awarded by the jury. Petitioners rejected respondents' offer on February 17, 1989.

Respondents answered the petitioners' rejection of their offer with a letter

dated March 30, 1989 which stated, inpart, that "North American will stand on its initial offer".

C. PROCEEDINGS BELOW

Petitioners commenced this legal action in the Federal District Court for the Northern District of New York on April 26, 1989. In their original complaint petitioners alleged several causes of action including respondents' failure to comply with Interstate Commerce Commission (ICC) regulations regarding shipper's rights, fraud in the inducement, negligent misrepresentation, negligence, gross negligence and breach of the contract. The original complaint sought both compensatory and punitive damages.

As the litigation progressed, the petitioners made discovery demands which included requests for "original" documents,

claims adjusting guides or manuals, repair records of the truck involved, and the original photos taken by respondents' agent hired to inspect the damage. Respondents and their then attorney continually claimed that respondents were not in possession of such documents. Finally, after two discovery conferences, held on June 1, 1990 and June 15, 1990, the Magistrate, to whom the discovery dispute had been referred, found the behavior of the respondents and respondents' attorney to be "grossly improper practices", "foot dragging", "stonewalling" and designed to "frustrate the discovery process in a deliberate attempt to obstruct plaintiffs' prosecution of this litigation". (App., *infra*, A 68, A 69-70). The documents claimed not to exist were eventually produced. As a result of respondents and their counsel's conduct, the court imposed sanctions pursuant to

Fed. R. Civ. P. 37. Petitioners were awarded attorney's fees in the amount of $5,860. These actions by respondents to impede and frustrate discovery further delayed the fair adjustment of the petitioners' claim. Following the resolution of the discovery dispute, Chief District Judge McCurn granted petitioners' motion to amend their complaint to include a federal common law claim for the bad faith tort of breach of the implied covenant of good faith and fair dealing and to add a claim for fraud with respect to respondents' withholding and falsifying business records. (App., *infra*, A 20).

Prior to trial the parties stipulated that there was a lawful, valid bill of lading. Accordingly, petitioners withdrew their fraud in the inducement, negligence and gross negligence causes of action.

Trial commenced on March 1, 1993 and ended on March 5, 1993. The district court submitted to the jury three theories of liability : (1) a claim for loss and damage to property under the Carmack Amendment, (2) a claim for negligent misrepresentation of the terms of the protection plan, and (3) a tort claim for punitive damages based upon a federal common law theory of breach of the implied covenant of good faith and fair dealing in the transport of petitioners' belongings and the processing of their loss and damage claim.

In its charge to the jury, the district court specifically directed that damages, if any, for the federal common law tort claim were to be exclusive of damages awarded for actual loss under the contract or Carmack Amendment cause of action. The district court further directed the jury that it could award petitioners punitive

damages only if "defendants acted with such morally culpable conduct and wanton dishonesty so as to imply a criminal indifference to their civil obligations under the contract to transport (petitioners') household goods."

On March 5, 1993 the jury awarded petitioners $28,000.00 in compensatory damages under the Carmack Amendment cause of action. It found for the respondents on the negligent misrepresentation cause of action. The jury awarded petitioners $50,000.00 in punitive damages under petitioners' federal common law cause of action for respondents' bad faith tort of the breach of the implied covenant of good faith and fair dealing. Judgment confirming the jury's verdict was entered on March 8, 1993.

Respondents made post-judgment motions pursuant to Fed. R. Civ. Proc. 50(b) and 59

to set aside the punitive damages awarded and for a new trial. Petitioners' cross-moved for pre-judgment and post-judgment interest. On April 29, 1993 the district court denied respondents' motions to set aside the punitive damage award and for a new trial and granted petitioners' motion for interest. (App., *infra*, A 95). Judgment was entered on May 17, 1993.

Respondents filed a timely Notice of Appeal to the Second Circuit Court of Appeals on May 21, 1993. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. In its July 27, 1994 decision, (App., *infra*, 1 A) the court of appeals reversed the judgment of the district court insofar as it awarded petitioners' punitive damages under their federal common law causes of action but otherwise affirmed the district court's judgment.

The court of appeals acknowledged that this case presented a "legally complex question" (App., *infra*, A 10) which was complicated by the fact that there was no legislative history from which to divine the intent of Congress in enacting the Carmack Amendment. (App., *infra*, A 11). Accordingly, the court of appeals turned to this Court's decision in Adams Express Co. v. Croninger, 226 U.S. 491(1913) for guidance.

The court of appeals found that the Adams Express case described the Carmack Amendment in broad preeemptive terms which reasoned that to construe the Amendment's savings clause (a predecessor of 49 U.S.C. § 10103) as grounds for permitting state law remedies, would emasculate the Carmack Amendment itself. The court of appeals noted that while the Adams Express case and a host of circuit court cases stood for the

proposition that the Carmack Amendment preempts state common law remedies which might be asserted against a carrier for goods shipped under a bill of lading, such authority was not dispositive on the question of whether a federal common law remedy against a carrier would likewise be preempted, noting that the concept of preemption has no application where the law to be preempted, is a federal rule of common law" because "[f]ederal common law should not ordinarily lead to disparate treatment of defendants in different federal courts." (App., *infra*, A 13).

The court of appeals also took note of two district court cases which recognized that punitive damages were recoverable under federal common law in cases involving the scope and application of the Carmack Amendment. In Drucker v. O'Brien's Moving and Storage, Inc., 745 F.Supp. 616, (D.

Nev. 1990), aff'd on other gounds, 963 F.2d 1171 (9th Cir. 1992), the district court permitted a claim for breach of the implied covenant of good faith and fair dealing to be asserted under federal common law and awarded punitive damages. Likewise, in Miller v. AAACON Auto Transp. Inc., 447 F. Supp. 1201 (S.D. Fla. 1978) the district court opined that "punitive damages might be recoverable under federal common law, where a carrier has injured a plaintiff by acting with 'actual malice or reckless or wanton indifference to the rights of plaintiff'". Id. at 1205.

It is important to note, however, that in its discussion of whether the Carmack Amendment precluded an award of punitive damages under federal law, the court of appeals failed to address the Fourth Circuit case of Hubbard v. Allied Van Lines, 540 F.2d 1224 (4th Cir. 1976)

wherein the court concluded that the "Carmack Amendment itself presents no barrier to the recovery of punitive damages" under federal law. Id. at 1228.

In reaching its ultimate conclusion that a federal common law claim for punitive damages based upon the "breach of the implied covenant of good faith and fair dealing cannot exist alongside the Carmack Amendment" (App., *infra*, A 16), the court relied upon this Court's decision in Missouri, Kansas & Texas Railway Co. v. Harris, 234 U.S. 412 (1914) and the more recent case Tenth Circuit case, A.T. Clayton & Co. v. Missouri-Kansas-Texas R.R., 901 F2d 833 (10th Cir. 1990). In both cases, state statutes awarding attorney's fees in Carmack cases were held not preempted by the Carmack Amendment because the statutes did not substantively enlarge the responsibility or liability of

the carrier. Reasoning that "punitive damage awards could have a dramatic effect on a carrier's liability and seriously enlarge a shipper's remedy" (App., *infra*, A 15) the court of appeals concluded that the award of punitive damages under federal common law tort claims was inconsistent with the Interstate Commerce Act and "would frustrate the uniformity goal of the Carmack Amendment." (App., *infra*, A 16).

REASONS FOR GRANTING THE PETITION

The reasoning expressed by the Second Circuit in its analysis of the Carmack Amendment's preemptive scope is at variance with the reasoning, and is in conflict in principle with, Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224 (4th Cir. 1976) and Overbrook Farmers Union Cooperative Association v. Missouri Pacific Railroad Company, 21 F.3d 360 (10th Cir. 1994).

Further, the Second Circuit's decision in this case (App., *infra*, A 1) misconstrued and misapplied the opinions of this court in Adams Express Co. v. Croninger, 226 U.S. 491 (1913) and Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U.S. 412 (1914) with respect to the scope, purpose, and preemptive effect of the Carmack Amendment.

At the district court level, conflicting decisions exist in several circuits and a number of cases are pending which turn on the resolution of this issue. The need for guidance from this court is acute. This case provides a timely and rare opportunity to provide that guidance since, due to the nature of the claims brought by individual shippers and the delay and costs associated with an appeal, few district court decisions receive appellate review. Moreover, the decision below is erroneous,

the issues it addresses are important nationally and not heretofore considered by this Court.

I. THE COURT OF APPEAL'S INTERPRETATION OF THE CARMACK AMENDMENT CONFLICTS IN PRINCIPLE WITH THE FOURTH AND TENTH CIRCUITS' INTERPRETATION AND THAT OF SEVERAL DISTRICT COURTS

The principal reason expressed by the court of appeals for finding that the Carmack Amendment preempted petitioners' federal common law tort claim for punitive damages was that "punitive damage awards could have a dramatic impact on a carrier's liability ..., seriously enlarge a shipper's remedy ... (and) would frustrate the uniformity goal of the Carmack Amendment." (App., *infra*, A 15-16). However, other circuit courts and several district courts, in reaching the conclusion that punitive damage awards are permitted

under the Carmack Amendment, have reasoned otherwise.

In Hubbard v. Allied Van Lines, 540 F. 2d 1224, 1227 (4th Cir. 1976) the court, quoting this Court's decision in New York, Philadelphia & Norfolk R.R. v. Peninsula Produce Exchange, 240 U.S. 34 (1916), which said that the language of the Carmack Amendment was "'comprehensive enough to embrace all damages from any failure to discharge a carrier's duty'", held that punitive damages could be awarded. The Hubbard court noted that attempts to construe the language of the Carmack Amendment to preclude the award of punitive damages would require the court to "disregard the literal terms of the balance of its language and its evident overall meaning". Hubbard v. Allied Van Lines, supra at 1227. Accord, Southern Pacific Transportation Company v. United States of

America, 456 F.Supp. 931, 938 (E.D. Calif. 1978).

Further, the Hubbard court noted that the Carmack Amendment's savings clause, which preserves any remedy a shipper had under existing law, "refute(s) ...(the) ... implicit contention that Congress in passing the Carmack Amendment effected any general limitation on the liability of carriers under other laws." Hubbard v. Allied Van Lines, supra at 1228.

Thus, contrary to the holding of the Second Circuit in this case, the Fourth Circuit Hubbard case did not find the award of punitive damages to be fatally inconsistent with the purpose of the Carmack Amendment.

The Tenth Circuit's history of dealing with the issue of punitive damages in the context of Carmack Amendment cases is illustrative of the confusion and divergent

approaches existing in both the circuit and district courts which is in desperate need of clarification and guidance from this Court.

In 1971 the Tenth Circuit, in Litvak Meat Company v. Baker, 446 F.2d 329, 335 (1971) held that:

> The Carmack Amendment was not designed as a comprehensive restatement of the law, redefining with encyclopedic breath and detail all rights and responsibilities of interstate freight shippers and carriers.

Accordingly, the Litvak court held that the Carmack Amendment savings clause "did not oust all other remedial rights of shippers." Id. at 337. Ten years later, the Tenth Circuit again visited the issue in Reed v. AAACON Auto Transport Inc., 637 F.2d 1302 (1981). In the Reed case the court agreed with the Fourth Circuit Hubbard case and held that the Carmack Amendment did not preclude awards of punitive damages based on state common law

theories. Reed v. AAACON, supra at 1307. Then, in 1989 in Underwriters at Lloyds of London v. North American, 890, F.2d 1112 (10th Cir. 1989), the Tenth Circuit overruled its prior holdings in Litvak and Reed and held that the Carmack Amendment "preempts state common law remedies for negligent damage to goods shipped by a common carrier." Id. at 1113.

Although still holding that state common law remedies were preempted, one year later in 1990 the Tenth Circuit held that a state statute awarding attorney's fees in interstate shipping cases did not violate the purposes of the Carmack Amendment and thus, were not inconsistent with and thus not preempted by the Carmack Amendment because "it promotes settlement, encourages small well-founded claims and discourages unnecessary litigation". A.T. Clayton &

Co. Missouri-Kansas-Texas R.R., 901 F.2d 833, 835 (10th Cir. 1990).

Finally, in an opinion delivered in March of this year by the Hon. Circuit Judge Goodwin, one of the three judges deciding this case, the Tenth Circuit, in discussing the impact of punitive damages in common carrier cases, said:

> Common sense, as well as history, suggest that unless the possibility of punitive damages exists as a sanction for willful violations ... common carriers will be inclined to pursue a cost-benefit approach in deciding whether ... to pay compensatory damages ... History also teaches that ...(common carriers) have enjoyed a close, and often cordial relationship with the ICC over the last three quarters of a century. Thus, it is not surprising to find no ICC cases awarding punitive damages. Notwithstanding the trial court's argument that, in a proper case, punitive damages should be available as a remedy ... neither Congress nor the Supreme Court has yet defined what is a proper case. Overbrook Farmers Union Cooperative Association v. Missouri Pacific Railroad Co., 21 F.3d 360, 364 (10th Cir. 1994).

The Court then opined that "the savings clause could, in the proper case, allow

punitive damages for egregious violations of the Act." Id. Thus, the Tenth Circuit's apparent position is that punitive damages are not inconsistent with the purpose of the Carmack Amendment and are not preempted in cases of egregious violations, while the Second Circuit, even though noting that the equities in the instant case cry out for punitive damages, holds that such damages are inconsistent with and are preempted by the Carmack Amendment.

District courts from three other circuits which have had the occasion to pass on issue have held that the Carmack Amendment does not preempt federal common law causes of action for punitive damages.

Most on point is Drucker v. O'Brien's Moving and Storage, Inc., 745 F.Supp. 616 (D. Nev. 1990), aff'd on other grounds, 963 F.2d 1171 (9th Cir. 1992) a case recognized by the Second Circuit but not followed. In

a remarkably similar fact pattern to that of this case, the district court recognized the federal common law tort of breach of the implied covenant of good faith and fair dealing in a contract controlled by the Carmack Amendment and permitted the recovery of punitive damages on the claim. Id. at 622.

In another case taken note of by the Second Circuit but not followed, the district court in Miller v. AAACON Auto Transport, Inc., 447 F.Supp. 1201, 1205 (S.D. Fla. 1978) recognized that punitive damages are "recoverable under federal common law, where a carrier has injured a (shipper) by acting with 'actual malice or reckless or wanton indifference to the rights of the (shipper).'"

In Wright v. Chicago, Burlington & Quincy Railroad Company, 223 F.Supp. 660, 662 (N.D. Ill. 1963) the district court

recognized that punitive damages could be awarded against common carriers who were subject to the jurisdiction of the Interstate Commerce Act.

In further conflict in principle with the reasoning of the Second Circuit is the Eighth Circuit decision in Caspe v. AAACON Transportation, Inc., 658 F.2d 613 (8th Cir. 1981) which, although not dealing with punitive damages, illustrates the point that federal common law remedies are available to shippers in addition to those contained in the Interstate Commerce Act.

The Court in Caspe, citing to Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), held that it had the inherent power under federal common law to award attorney's fees in appropriate cases. Thus, although an interstate commerce case subject to the jurisdiction of the Interstate Commerce Act, the court

apparently did not consider the Carmack Amendment as preemptive of a shipper's federal common law remedies. Caspe v. AAACON, at 618.

As a result of the difficulty facing individual shippers in securing appellate review, district courts will only rarely obtain guidance from the federal courts of appeal on this issue, and, as noted above, that guidance is often inconsistent and divergent. This case presents the Court with a rare opportunity to provide clarification and promote uniformity on these issues, and the Court should take it.

II. THE DECISION OF THE COURT OF APPEALS MISAPPLIES SUPREME COURT PRECEDENT AND IS ERRONEOUS.

The Second Circuit concluded that because Congress "comprehensively and directly" addressed the issue of a shipper's remedies in enacting the Carmack

Amendment, petitioners' could not recover punitive damages under a federal common law tort cause of action for breach of the implied covenant of good faith and fair dealing. In reaching its conclusion, the court of appeals relied on, but misapplied this Court's decisions in Adams Express Co. v. Croninger, 226 U.S. 491 (1913) and Missouri, Kansas & Texas Railway Co. v. Harris, 234 U.S. 412 (1914).

The Second Circuit at one point in it decision correctly observed that the Adams Express case dealt solely with the issue of preemption of state common law causes of action and not the federal common law cause of action at issue in this case (App., *infra* A 12) and that preemption has no application where the law to be preempted is a federal rule of common law. (App., *infra*, A 13)

In the context of discussing the Carmack Amendment's preemption of state common law, this Court in the Adams Express case considered the impact of the proviso contained in the Carmack Amendment, then 49 U.S.C. § 20 (11), which stated "nothing in this section shall deprive any (shipper) of any remedy or right of action which he has under existing law." The Court quoting Texas Pacific Railway v. Abilene Cotton Mills, 204 U.S. 426, said that the proviso

> "'evidently only intended to continue in existence such other rights or remedies ... whether given by the Interstate Commerce Act, or by state statute, or common law not inconsistent with the rules and regulations prescribed by the provisions of this act ... [T]he act cannot be said to destroy itself.'"
>
> Adams Express v. Croninger, supra at 507.

Based upon the foregoing, the court of appeals found that the savings clause did not apply to the petitioners' federal

common law tort claim and held it preempted by the Carmack Amendment.

However, in the paragraph following the language relied upon by the court of appeals to preempt petitioners' federal common law claim, the Court in Adams Express expressed the following opinion:

> To construe this proviso as preserving ... any right or remedy which he may have had under existing federal law ... gives to it a more rational interpretation...(Emphasis supplied) Id.

Thus this Court in Adams Express clearly recognized that existing federal remedies were not, as the Second Circuit wrongly concluded, automatically preempted.

Likewise, in Missouri, Kansas & Texas Railway Co. v. Harris, 234 U.S. 412 (1914) this Court held that the recovery by the shipper of his attorney's fees under a Texas statute did not "in anywise either enlarge or limit the responsibility of the carrier for the loss of property entrusted

to it in transportation." Id. p. 234. In addition, the Court held that the "application of [the] statute to actions for goods lost in interstate commerce is not inconsistent with the provisions of the Commerce Act and its amendments" and therefore not preempted by the Carmack Amendment. (Emphasis supplied) Id. at 421.

Thus, the Harris court established the standard of review when state statutory provisions involve common carriers subject to regulation by the Interstate Commerce Act and, in particular, the Carmack Amendment. This standard of review was more recently restated in the Tenth Circuit as whether the state statute affecting the common carrier "substantively enlarges the carrier's responsibility." A.T. Clayton & Co. v. Missouri-Kansas-Texas R.R., 901 F.2d 833, 835 (10th Cir. 1990).

Notwithstanding that the standard of review first espoused in Harris and later restated in Clayton was clearly restricted to the analysis of state statutory provisions vis-a-vis their impact on common carriers, the Second Circuit improperly misapplied this state law standard of review to claims asserted by the petitioner under federal common law and held the claim preempted by the Carmack Amendment.

It is respectfully submitted that the proper test for determining whether punitive damages may be awarded under federal common law is set forth in the savings clause itself.

Originally the savings clause language was cast in terms of preserving to a shipper all remedies "under existing law." 49 U.S.C. § 20(11). As now recodified the, savings clause provides that the remedies in the Act are "in addition to remedies

existing ... at common law." 49 U.S.C. § 10103. Thus, the relevant inquiry and test of whether punitive damages may be awarded under federal common law against a common carrier subject to the jurisdiction of the Carmack Amendment is whether the recovery of punitive damages was available under federal common law at the time of the enactment of the Carmack Amendment, not its presently preceived impact on carrier liability.

In 1893, just after the enactment of the Interstate Commerce Act of 1887 and prior to the 1906 enactment of the Carmack Amendment, this Court summarized the state of the law of punitive damages in the context of common carriers subject to the jurisdiction of the Interstate Commerce Act. This Court said:

> The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending

> in like manner, is here clearly recognized.
>
> In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations.
>
> Lake Shore & Michigan Southern Railway Co. v. Prentice, 147 U.S. 101, 107 (1893)

See also, Smith v. Wade, 461 U.S. 30, 47 (1983) (holding "the common law, both in 1871 and now, allows recovery of punitive damages in tort cases not only for actual malicious intent, but also for reckless indifference to the rights of others")

In Lysaght v. Lehigh Valley R. Co., 254 F.351 (S.D.N.Y. 1918), aff'd. 271 F. 906 (2nd Cir. 1921), cert. denied, 256 U.S. 704 (1922) the noted jurist Learned Hand, writing in the period immediately following the 1916 Cummins Amendments explained the

meaning of the savings clause then in effect saying:

> The phrase "existing law" means existing common law as understood in the federal courts and excludes changes effected by state statute.
>
> Id. at 353.

Judge Hand further noted:

> There cannot be any doubt that section 20 (the Carmack Amendment) was intended to adopt the carrier's liability as it was understood at that time ...(and) ... that the proviso of section 20 incorporates unyieldingly the exact status of the federal common law into the statute ...(and) ... it certainly does affirm the general liability of carriers so derived as a part of the statute as a whole." (Emphasis supplied).
>
> Id. at 354.

Thus, based upon Judge Hand's analysis not only does the Carmack Amendment not preempt the federal common law of punitive damages as a shipper's remedy with respect to common carriers because such punitive damages were part of the existing federal common law, the savings clause actually "incorporates" and "adopts" the

availability of punitive damages as a remedy available to a shipper, in a proper case, into the statute itself. Accordingly, regardless of whether the federal common law remedies for punitive damages were preserved by the savings clause or incorporated into and made a part of the Carmack Amendment itself, punitive damages are an appropriate remedy and may properly be awarded to petitioners in this case.

Finally, this Court has held that a statute should be interpreted in a way that gives effect to all of its provisions. See, Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985). If the Carmack Amendment's savings clause were construed in the way urged by the Second Circuit, the main body of the provision, preserving remedies existing at common law, would have no

meaning or effect. Thus, the court of appeals' construction must be rejected.

Accordingly, the language of the Carmack Amendment's savings clause, construed in light of the federal common law existing at the time it was enacted, contradicts the court of appeals' decision. This Court should grant the petition to correct the Second Circuit error.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

This cases arises out of a shipping contract for the move of petitioners' household goods in interstate commerce. The Annual Performance Report of the Interstate Commerce Commission for 1990 (the last year figures are available) indicates that in 1990 there were 356,163 shipments made by individual shippers in the United States. When commercial shippers and government shipments are

included, the total number of shipments made in interstate commerce and handled by common carriers subject to the jurisdiction of the Interstate Commerce Commission reaches 957,679. Claims were filed by shippers against carriers with respect to 4.27% of all such moves, equating to over 40,000 claims filed per year.

Thus, the issues regarding limitations on carrier liability, good faith and fair dealing in the claims settlement process and the remedies available to shippers to recover damages from carriers raised in this case are issues recurring virtually daily and effecting a large group of consumers.

The fact that petitioners' suit is <u>not</u> a unique case or isolated aberration of shipping industry practices and the claims adjustment process is borne out by the large number of reported cases in both

federal and state courts which recount the same indifference, fraud, misrepresentation, and bad faith settlement practices engaged in by common carriers against shippers.

Cases in federal district courts and circuit courts of appeal demonstrate a degree of diverse and conflicting voices regarding the issues raised in this case. A considerable number of cases are pending in district and circuit courts which turn on the resolution of the issues presented in this case. The need for this Court to provide guidance and clarification because of the divergent approaches being taken by the circuit and district courts is acute.

Further, due to the nature and dollar value of the claims brought by individual shippers, this case provides a rare opportunity to provide the clarification and guidance needed since relatively few dis-

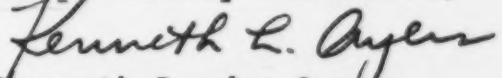
trict court decisions receive appellate review. Absent this Court's intervention, the law developing in the lower courts involving interstate shipments will promote inequity and result in chaos.

Finally, not only are the issues presented in this case important nationally, but they have heretofore not been addressed by this Court. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,



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October 21, 1994

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 583—August Term 1993

(Argued November 8, 1993 Decided: July 27,1994)

Docket No. 93-7516

DONALD L. CLEVELAND; CHRISTA A. CLEVELAND,

Plaintiffs-Appellees,

—v.—

BELTMAN NORTH AMERICAN CO., INC.;
N. AMERICAN VAN LINES,

Defendants-Appellants.

Before:

CARDAMONE, JACOBS and GOODWIN*

Circuit Judges

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* Hon. Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Beltman North American Co., Inc. and North American Van Lines, defendants, appeal from a judgment entered on March 8, 1993 by the United States District Court for the Northern District of New York (Scullin, J.), after a jury trial awarding plaintiffs, Donald L. and Christa A. Cleveland, husband and wife, $28,000 in compensatory damages and $50,000 in punitive damages and from a judgment entered on May 17, 1993 amending the judgment to provide pre- and post-judgment interest and denying defendants' motion to alter and amend the judgment and for a new trial.

Reversed, in part, insofar as the judgment awarded plaintiffs punitive damages, and otherwise affirmed.

WILLIAM J. DREYER, Albany, New York (Daniel J. Stewart, Dreyer, Boyajian & Tuttle, Albany, New York, of counsel), *for Defendants-Appellants Beltman North American Co., Inc.; N. American Van Lines.*

KENNETH L. AYERS, West Coxsackie, New York (Law Offices of Kenneth L. Ayers, West Coxsackie, New York, of counsel), *for Plaintiffs-Appellees Donald L. Cleveland and Christa A. Cleveland.*

George W. Wright, Newark, New Jersey (Kroll & Tract, Newark, New Jersey, of counsel), *filed an amicus curiae brief for American Movers Conference.*

CARDAMONE, *Circuit Judge*:

This appeal brings before us a married couple whose household belongings, after being transported by movers from Iowa to New York, were found upon arrival to be badly damaged. When claims made against the moving company to obtain compensation proved unavailing, the instant litigation was commenced. In handling plaintiffs' claims, the moving company—in a deliberate and determined effort to frustrate plaintiffs' collection of damages for their losses—was guilty of foot-dragging and stonewalling. It did not deal fairly or in good faith with the couple.

Ordinarily, common law principles of equity leaven the law, softening its rigors so that the law's aim of administering justice fairly is not lost. But on occasion, and this is one, the equities urge a course that the law may not take. Here, a hope that conduct such as that shown by the moving company could result in an award beyond compensatory damages is doomed to disappointment. We must reckon with an area of interstate commerce law that has been fully occupied by Congress' passage of a statute delineating what remedies are available, leaving no room for additional state or federal common law causes of action.

BACKGROUND

Plaintiffs' Move to New York

In August 1988 Donald and Christa Cleveland moved from West Des Moines, Iowa to Slingerlands, New York, a suburb of Albany. To prepare for the move, the Clevelands searched for a reputable moving company to carry their household goods and personal belongings. In a deci-

sion they have no doubt come to regret, they hired defendant North American Van Lines (North American) and North American's local agent in Des Moines, defendant Beltman North American Co., Inc. (Beltman). North American and Beltman (defendants) are common carriers as that term is defined by the Interstate Commerce Act, 49 U.S.C. § 10102(4) (1988).

Following the usual practice, the Clevelands, North American, and Beltman executed a shipping contract, commonly called a bill of lading. Under a standard bill of lading carriers are responsible for only 60 cents per pound for damaged items. Having recently purchased new furniture, the Clevelands worried whether this reimbursement rate would adequately cover a loss they might incur were their belongings to be accidentally damaged or lost. Because of this concern, they purchased supplemental protection from the moving company at an additional cost of $320. The protection plan, which was incorporated into the bill of lading, provided for the repair, replacement or 100 percent reimbursement at current prices without depreciation for any goods damaged or lost during transport for a sum up to $50,000.

Beltman loaded the Clevelands' possessions into its van on August 19, 1988. When the driver who was scheduled to drive the van to New York State was unable to do so on account of family illness, the trailer with the Clevelands' household goods was separated from its tractor and taken to Beltman's lot in Des Moines to await another driver. After several days a new driver was found, but as a result of this change the Clevelands' belongings were reloaded onto a different van. Since it was North American's policy to require that blankets and other packing materials utilized by the initial loaders remain with the original van,

upon being reloaded into a different van the Clevelands' goods were repacked.

This shipment—now several days late—then began its journey from Iowa to upstate New York. It appears—from information inserted into appellant's brief—that while en route, this second moving van was in an accident causing its fifth wheel to break through the floor of the truck, upheaving the Cleveland's furniture and creating a hole that exposed the truck's contents to water. Ultimately plaintiffs' goods arrived in Slingerlands, New York on August 30, 1988, a week late. When the truck was unloaded, the Clevelands immediately noticed that many of their possessions had been extensively damaged by rainwater that had soaked and stained some of the new items of furniture. Other damage had been caused by the furniture's upheaval or by sloppy repacking and reloading at Beltman's lot in Des Moines. Even though the damage was extensive and included items that would normally qualify for "priority" handling in their repair—for example, a home refrigerator was delivered without its doors being reattached—defendants nonetheless unreasonably assigned this claim to its representative to process on a "regular" basis.

Believing the supplemental plan they had purchased would expedite a recovery for their loss, the Clevelands on September 13, 1988, two weeks after their furniture arrived, made a timely claim with North American both for delay and actual damages to their belongings. The claim for delay damages was paid promptly by North American and is not at issue. Shortly after filing their damages claim the Clevelands realized several items were missing entirely, including Donald Cleveland's tax and business records. A supplemental claim was filed for this loss.

The claims settlement process started smoothly enough. North American dispatched Andrea Daley, who was associated with the Albany, New York firm of Restorers of America, to inspect the Clevelands' goods. She arrived at their home on October 5. During that visit and several others, she took many photographs of the damaged personalty. She also brought along a repairman from an upholstery shop to inspect the damage to the Clevelands' furniture, some of which had been stained purple. The settlement process subsequently grew acrimonious. The Clevelands sent several letters to North American regarding the status of their claims. None of them were answered. By mid-December 1988 the Clevelands, exasperated by this exhibition of foot-dragging by North American, refused to further assist Ms. Daley in her assessment of their property for settlement purposes.

In the second week of February 1989—nearly six months after they had moved—the Clevelands received an offer of settlement for the damages claim from North American in the amount of $9,824.46. As noted, the Clevelands also had submitted a claim that itemized their missing belongings. The offer included no money for their missing belongings, averring that Mr. Cleveland's signature on the delivery receipt indicated that all items had been delivered. This assertion, like much else in this record, reveals that defendants have little, if any, commitment to the truth. In fact, Mr. Cleveland had specifically crossed out the language in the receipt that North American relied upon, and had written instead: "Since the damage was extensive, we have not confirmed the presence of everything."

Plaintiffs rejected North American's offer on February 17, 1988. By letter dated March 30, 1989 North American declined to increase the settlement offer. Nearly four

years later, in March 1993, on the eve of trial, North American offered $40,000 in settlement, which the Clevelands also refused.

Proceedings Below

On April 26, 1989 the Clevelands commenced the instant action in the United States District Court for the Northern District of New York, asserting a number of causes of action. They alleged that defendants, first, failed to comply with Interstate Commerce Commission (ICC) regulations regarding shippers' rights and responsibilities under 49 C.F.R. § 1056.2 (1993); second, were guilty of fraud in inducing plaintiffs to sign the shipping contract; third, made negligent misrepresentations; and fifth and sixth, were guilty of negligence and gross negligence respectively.

As their fourth claim, plaintiffs asserted breach of contract. This cause of action, as will become apparent in a moment, evolved into a statutory claim brought under the bill of lading, pursuant to 49 U.S.C. §§ 10103, 10730 and 11707 (Carmack Amendment), for the loss, damage or injury that the defendants caused to the Clevelands' goods.

Defendants' conduct during discovery further evinced their fixed attitude to stonewall claims and demands until forced by circumstances or court order to be forthcoming. Nearly seven months after the litigation began, plaintiffs sought copies of the photographs taken by Ms. Daley, and copies of various of defendants' procedure manuals. Defendants and their counsel declared that such manuals did not exist. Eventually the supposedly non-existing materials were found and turned over to plaintiffs, who then moved to sanction defendants. The magistrate to

whom the matter was referred found "that defendants and defense counsel have together engaged in a continuing series of acts designed to frustrate the discovery process in a deliberate attempt to obstruct plaintiffs' prosecution of this litigation." Defendants and their counsel were accordingly sanctioned pursuant to Fed. R. Civ. P. 37. Plaintiffs were awarded attorney's fees amounting to $5,860. Defendants then retained present counsel.

In the wake of the discovery dispute, Chief District Court Judge Neal P. McCurn, in a decision and order dated February 13, 1992 granted plaintiffs' motion to amend their complaint to include a federal common law claim for breach of an implied covenant of good faith and fair dealing. The district court directed that damages, if any, for this claim were to be exclusive of damages awarded for actual loss under the bill of lading. It also permitted plaintiffs to add a claim for fraud with respect to the defendants' withholding and falsifying of business records.

When the parties later stipulated that there was a lawful, valid bill of lading, plaintiffs withdrew their fraud in the inducement, negligence, and gross negligence claims, that is, the second, fifth and sixth causes of action. The trial court, Judge Frederick J. Scullin, Jr., submitted to the jury three theories of liability: (1) a claim for loss and damage to property under the Carmack Amendment, (2) a claim for a negligent misrepresentation of the terms and conditions of the protection plan, and (3) a tort claim for punitive damages based on a common law theory of breach of an implied covenant of good faith and fair dealing in the handling of plaintiffs' move and the processing of their loss and damage claim. Because it was unable to ascertain what the standard for a breach of the implied covenant of good faith and fair dealing claim should be,

the district court looked to New York law for breach of an insurance contract, instructing the jury that it could award plaintiffs punitive damages if "defendants acted with such morally culpable conduct and wanton dishonesty so as to imply a criminal indifference to their civil obligations under the contract to transport [plaintiffs'] household goods."

The jury returned its verdict on March 5, 1993, awarding plaintiffs $28,000 in compensatory damages under the Carmack Amendment claim, and $50,000 in punitive damages for defendants' breach of the implied covenant of good faith and fair dealing. It found for defendants on the negligent misrepresentation claim. The district court entered a judgment confirming the jury's award on March 8, 1993.

Defendants then moved pursuant to Fed. R. Civ. P. 50(b) and 59 to set aside the punitive damage award and for a new trial. They argued that an award of punitive damages was preempted by the Carmack Amendment or, alternatively, that the award was inconsistent with New York law for such an award. Plaintiffs cross-moved for pre-judgment and post-judgment interest. Judge Scullin denied defendants' motion to set aside the punitive damage award and for a new trial; he granted plaintiffs' motion for interest and entered an amended judgment on May 17, 1993. This appeal followed.

DISCUSSION

I

Defendants urge on appeal that punitive damages were wrongly awarded as a matter of law; that such an award was also wrong as a matter of fact as against the weight of

the evidence; and that evidence of the discovery dispute was improperly admitted at trial. The only question we need address is the first one: whether the Carmack Amendment to the Interstate Commerce Act of 1887 (Act) preempts plaintiffs' claim under federal common law for breach of the implied covenant of good faith and fair dealing so as to make legally inappropriate the jury's award of $50,000 in punitive damages on this claim. Our disposition of this legally complex question, one of first impression in this and other circuits, makes it unnecessary for us to decide the two other issues raised.

The Carmack Amendment was passed in 1906 as part of the Hepburn Act, ch. 3591, 34 Stat. 584. It addresses the subject of carrier liability for goods lost or damaged during shipment, and most importantly provides shippers with the statutory right to recover for the *actual loss* or injury to their property caused by any of the carriers involved in the shipment. *See* 49 U.S.C. § 11707(a)(1) (1988) (emphasis added). Relevant portions of the Carmack Amendment are:

> A common carrier . . . subject to the jurisdiction of the Interstate Commerce Commission . . . shall issue a receipt or a bill of lading for property it receives for transportation . . . . That carrier . . . and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission . . . are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States . . . .

Id. Of some significance is the following so-called savings clause, also a part of the Carmack Amendment:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

Id. § 10103.

This appeal is complicated by the fact that no legislative history accompanied the Amendment. It was adopted without discussion or debate. *See* 40 Cong. Rec. 7075 (1906). Shortly after its passage, the Supreme Court addressed the Carmack Amendment's scope in the then profuse area of railroad-related litigation. In a leading case, *Adams Express Co. v. Croninger*, the Court described the Amendment in broad, preemptive terms. *See* 226 U.S. 491, 506-08 (1913). Reasoning that to construe the savings clause before it (a predecessor of § 10103) as grounds for allowing plaintiffs to avail themselves of state remedies would emasculate the Carmack Amendment itself, the Supreme Court said: "It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to." *Id.* at 507. On several subsequent occasions, the Supreme Court reaffirmed this holding. *See, e.g., New York, N.H. & H. R.R. v. Nothnagle*, 346 U.S. 128, 131 (1953); *Atchison, T. & S.F. Ry. v. Harold*, 241 U.S. 371, 378 (1916).

The defendants misapply this precedent and confuse what is the ultimate issue before us, which is whether *all* causes of action—other than those premised on the bill of lading and brought under the Carmack Amendment—are preempted by the Carmack Amendment. In other words, the question we must decide is whether Congress has

broadly occupied the *entire* field of interstate shipping to the exclusion of any other law and, in particular in this case, federal common law. We say the defendants have muddied the issue because they focus on the Carmack Amendment's preemption of state law.

We turn to defendants' position. The position they take is untenable because it analyzes the issue before us as though the Carmack Amendment was here preempting *state* law causes of action, skirting the fact that the trial court attempted to craft a *federal* common law cause of action. Defendants rely on *Adams Express* and a host of circuit court cases that stand for the proposition that the Carmack Amendment preempts *state* common law remedies that might be asserted against a carrier for damages to goods shipped under a proper bill of lading. *See, e.g., Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 705-06 (4th Cir. 1993); *Hughes Aircraft Co. v. North Amer. Van Lines, Inc.*, 970 F.2d 609, 613 (9th Cir. 1992); *Underwriters at Lloyds of London v. North Am. Van Lines*, 890 F.2d 1112, 1121 (10th Cir. 1989) (en banc); *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672, 677 (1st Cir. 1987); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir. 1987), *cert. denied*, 485 U.S. 913 (1988); *Hopper Furs, Inc. v. Emery Air Freight Corp.*, 749 F.2d 1261, 1264 (8th Cir. 1984); *Air Prods. & Chems., Inc. v. Illinois Cent. G. R.R.*, 721 F.2d 483, 486-87 (5th Cir. 1983), *cert. denied*, 469 U.S. 832 (1984); *W.D. Lawson & Co. v. Penn Cent. Co.*, 456 F.2d 419, 421 (6th Cir. 1972).

We have had occasion to address the subject at issue only peripherally, holding in *North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 234 (2d Cir. 1978), that a shipper's claims based upon the loss of goods during interstate transport arose under federal law. In so deciding, we stated: "Congress has created a broad,

comprehensive scheme covering the interstate shipment of freight, aimed at preventing preferential treatment among shippers and establishing national equality of rates and services. *This has occupied the field to the exclusion of state law.*" *Id.* at 233-34 (emphasis added).

None of these cases, including our own case, are particularly helpful in resolving the present issue. The district court, after acknowledging that federal law preempted the state law claims, adopted a federal common law rule in an attempt to circumvent the prohibition against state law being interposed in claims involving the shipment of goods in interstate commerce. The notion that federal law reigns supreme and preempts state law when uniformity on a national level is required is one of long standing. In discussing the need for the Supremacy Clause in the proposed Constitution, James Madison wrote that without it the whole of society would be subordinate to the authority of its parts. Our nation would be reduced to "a monster, in which the head was under the direction of the members." *The Federalist No. 44*, at 287 (Clinton Rossiter ed., 1961). The judicial development of the preemption doctrine put teeth in the Supremacy Clause, gave force to federal authority, and banished the specter conjured up by Madison.

Of course preemption has no application where the law to be preempted is a federal rule of common law. Thus, defendants' principal argument—that because state claims are preempted, a federal common law claim should be as well—simply misses the point. Federal common law should not ordinarily lead to disparate treatment of defendants in different federal courts.

We pass then to the precise issue in this case—whether federal common law claims arising out of a shipper's rela-

tionship with a common carrier are preempted by the Carmack Amendment. It is important in resolving this question to ascertain the outer boundaries of the Carmack Amendment's reach. Of some impact are several district court decisions that, in an attempt to create a more flexible approach to determining claims made in the interstate shipment of goods, have set themselves against the tide of statutory preemption of the field and looked instead to federal common law principles.

Most on point is *Drucker v. O'Brien's Moving & Storage Inc.*, 745 F. Supp. 616 (D. Nev. 1990). Presented with facts almost identical to those before us, the district court permitted a claim for breach of the implied covenant of good faith and fair dealing to be asserted under federal common law. *See id.* at 619. The printed version of this holding is contained in a transcript of the district judge's bench decision, and cites no authority. This case was the exclusive authority the district court judge in the case at hand relied upon.

Other district courts have taken somewhat similar positions. In *Mesta v. Allied Van Lines International, Inc.*, 695 F. Supp. 63 (D. Mass. 1988), the court allowed a state law claim for intentional infliction of emotional distress against a carrier. The court reasoned the claim was "based not on loss of property, but on the defendant's actions in investigating and responding to the plaintiff's claim. Such activities were not undertaken in the course of transporting goods, and are thus not within the scope of the Carmack Amendment." *Id.* at 65; *see also Sokhos v. Mayflower Transit, Inc.*, 691 F. Supp. 1578 (D. Mass. 1988) (holding Carmack Amendment does not preclude state law claims for unfair acts or deceptive practices, or for unfair claims settlement practices because these claims are not based on loss or damage to the shipper's belongings); *Miller v.*

Aaacon Auto Transp., Inc., 447 F. Supp. 1201, 1205 (S.D. Fla. 1978) ("[P]unitive damages might be recoverable under federal common law, where a carrier has injured a plaintiff by acting with 'actual malice or reckless or wanton indifference to the rights of the plaintiff.' ").

The just cited cases are purportedly the progeny of two more authoritative decisions. In *Missouri, Kansas & Texas Railway Co. v. Harris*, 234 U.S. 412 (1914), the Supreme Court upheld an award of attorney's fees pursuant to a Texas statute in a substantive action brought under the Carmack Amendment. The decision rested upon the Court's unanimous view that the cause of action "d[id] not in anywise either enlarge or limit the responsibility of the carrier for the loss of property entrusted to it in transportation, and only incidentally affect[ed] the remedy for enforcing that responsibility." *Id.* at 420. More recently, the Tenth Circuit similarly upheld an award of attorney's fees pursuant to an Oklahoma statute in a Carmack Amendment case, finding that it was an "incidental compensatory allowance." *A.T. Clayton & Co. v. Missouri-Kansas-Texas R.R.*, 901 F.2d 833, 835 (10th Cir. 1990). Relying on *Harris*, the issue as framed by the Tenth Circuit was whether the claim "substantively enlarges the carrier's responsibility for the loss." *Id.*

As amply evidenced by the verdict in this case, punitive damage awards could have a dramatic impact on a carrier's liability and seriously enlarge a shipper's remedy. A claim for breach of the implied covenant of good faith and fair dealing resulting in an award of punitive damages could well thwart one of the primary purposes of the Carmack Amendment; that is, to provide some uniformity in the disposition of claims brought under a bill of lading, *see Hughes v. United Van Lines, Inc.*, 829 F.2d at 1415 (purpose of Carmack Amendment is to "eliminat[e] uncer-

tainty as to a carrier's liability"). The Supreme Court has ruled that the Carmack Amendment's savings clause, now found at 49 U.S.C. § 10103, saves only those rights and remedies that are "not inconsistent with the rules and regulations prescribed by the provisions of this act. . . . [T]he act cannot be said to destroy itself." *Adams Express Co.*, 226 U.S. at 507. Because the availability of punitive damages would frustrate the uniformity goal of the Carmack Amendment, the Clevelands' appeal to the savings clause does them no good. It may be that Congress' enforcement scheme does not provide a sufficient deterrent to the type of conduct defendants employed in this case. Nonetheless, it is plain that a claim for breach of the implied covenant of good faith and fair dealing cannot exist alongside the Carmack Amendment. It is not for the courts to read a new remedy into the Act, if there is to be a new remedy, it is one Congress must legislate.

II

In urging us to affirm, the Clevelands point to the above authorities and to several other cases allowing federal common law claims. The Supreme Court's opinion in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), for one, is cited for the proposition that when a matter is of national concern, but there is an "absence of an applicable Act of Congress[,] it is for the federal courts to fashion the governing rule of law according to their own standards." We relied upon *Clearfield Trust*, in *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 491 (2d Cir. 1968), where we concluded that a uniform rule of federal common law was necessary to fill a gap in the federal Communications Act of 1934 in order to best serve the statute's purpose. Rec-

ognizing the preemptive effect of the Communications Act on state law, the panel turned to federal common law—not unlike what the district court did in the instant case. *See also Nordlicht v. New York Telephone Co.*, 799 F.2d 859, 862 (2d Cir. 1986) (relying on *Ivy Broadcasting* to hold that claims by a Canadian citizen against New York Telephone arose under federal common law), *cert. denied*, 479 U.S. 1055 (1987).

We are further mindful of the Supreme Court's opinion in *County of Oneida v. Oneida Indian Nation* where Justice Powell stated that:

> In determining whether a federal statute preempts common-law causes of action, the relevant inquiry is whether the statute "[speaks] *directly* to [the] question" otherwise answered by federal common law . . . . As we stated in *Milwaukee II*, federal common law is used as a "necessary expedient" when Congress has not "spoken to a *particular* issue."

470 U.S. 226, 236-37 (1985) (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-15 (1981)) (emphasis in original). All of this authority, which was cited by the Clevelands, is inapplicable in the context of the Carmack Amendment. *Oneida Indian Nation* is readily distinguishable because in that case Congress had not touched upon the subject matter at issue in the relevant statutes. *See* 470 U.S. at 237. The *Clearfield Trust* line of cases is also inapposite because in the context of interstate commerce, Congress has spoken directly and comprehensively, creating no need to develop rights judicially to ensure that Congress' aim is fulfilled.

Under the Carmack Amendment Congress has specifically addressed the issue of a shipper's compensation. *See* 49 U.S.C. § 11707(a)(1). In addition, the Interstate Com-

merce Act subjects carriers to a host of rules and regulations promulgated and enforced by the ICC. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) ("The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes."). There is a certification procedure for carriers, *see* 49 U.S.C. § 10922(b)(1) (1988), and the ICC has the ability to revoke or suspend carriers' certificates for willful violations of the Act or ICC regulations, *see id.* § 10925(b), or to impose monetary penalties against carriers, *see id.* § 11901(j). Further, the ICC can investigate carrier violations of its rules and regulations or of the Act, *see id.* § 11701(a), and individuals can register complaints with the ICC, *see id.* § 11701(b). Notably, ICC regulations govern the disposition of damage claims. *See* 49 C.F.R. Part 1005 (1993).

As the Supreme Court teaches in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), we should be reluctant to use federal common law to supplement comprehensive legislation. In the course of examining the scope of ERISA, the Court opined: "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." . . . "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.* at 147 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) and *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981)). *Accord Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely

the remedies it considered appropriate."); *cf. Hopper Furs, Inc.*, 749 F.2d at 1264 ("All actions against a common carrier . . . are governed by the federal statute.").

Consequently, because the issue of a shipper's compensation for actual loss or injury to its property has been comprehensively and directly addressed by the Carmack Amendment, a federal common law cause of action—even assuming such exists—is displaced by the Act that has established those remedies Congress deems appropriate in this field.

CONCLUSION

Insofar as the judgment of the district court awarded plaintiffs punitive damages, it is reversed; it is otherwise affirmed.

Each party to bear its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Plaintiffs,

-v- 89-CV-531

NORTH AMERICAN VAN LINES, and
BELTMAN NORTH AMERICAN CO., INC.,

Defendants.

APPEARANCES: OF COUNSEL:

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NEAL P. McCURN, C. J.

MEMORANDUM-DECISION AND
ORDER

BACKGROUND[1]

Plaintiffs Donald L. and Christa A. Cleveland brought this diversity action against the defendants, North American Van Lines, Inc. ("North American") and Beltman North American Company, Inc. ("Beltman"). In August, 1988, the Clevelands hired North American to ship their household goods and personal belongings from West Des Moines, Iowa, to Slingerlands, New York. In the process, the Clevelands entered into a shipping contract, commonly referred to as a bill of lading, with North American.[2] That bill of lading included a Replacement Cost Protection Plan ("RCP plan" or "the

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[1] This factual background is based upon allegations in the original, as well as in the proposed amended complaint, which the defendants accept as true for purposes of this motion only. See Defendants' Memorandum of Law at 1, n. 1.

[2] Even though under Rule 12(c) a court cannot properly consider matters outside of the pleadings, the court finds it curious that as part of their motion papers none of the parties supplied at least a copy of the bill of lading to the court. The bill of lading would have been helpful in ascertaining the exact factual context in which this dispute arose.

plan"), which the Clevelands purchased at an additional cost of $320.00. According to the Clevelands, prior to the time they executed the bill of lading, Beltmann[3] intentionally and negligently represented that the RCP plan would provide full replacement cost insurance protection for their household goods and personal belongings were damaged during shipping. Apparently the RCP plan actualy signed by the Clevelands, however, limited the carrier's liability for loss and damages to $50,000. In other words, in the event that Clevelands' household goods and personal belongings were damaged during shipping, under the plan, defendants would not be liable to the Clevelands for any resulting loss in excess of $50,000.00.

When the Clevelands received their household goods and personal belongings in

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[3] At this time, Beltmann was acting on its own behalf and as an agent of North American.

New York, they immediately noticed that some items were damaged and others were lost.[4] The Clevelands then made a timely claim for those goods, but were unable to agree with the defendants on a settlement amount. The Clevelands therefore commenced the present lawsuit asserting the following six causes of action: (1) failure to provide the plaintiffs with the information required under 49 C.F.R.§ 1056.2;[5] (2) fraud in the inducement; (3) negligent misrepresentation; (4) breach of contract; (5) negligence; and (6) gross negligence.

Practically from the outset this case has been fraught with discovery disputes requiring court intervention. Finally, on

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[4] The alleged value of the loss is approximately $36,000.00.

[5] Basically that regulation requires common carriers, such as North American, to provide prospective shippers with certain publications pertaining to the shipper's rights and responsibilities during a move, as well as "[a] written description of the customer complaint and inquiry handling procedures established and maintained by the carrier." See 49 C.F.R. § 1056.2 (1991).

November 26, 1990, the parties agreed, inter alia, that "[a]ny application to the court to amend any pleading shall be made on or before the 18th day of February, 1991." Affidavit of Kenneth L. Ayers (February 15, 1991), Ex. B thereto at ¶ 1. In accordance with Fed. R. Civ. P. 15, on January 18, 1991, plaintiffs served a copy of their proposed amended complaint on defense counsel, essentially requesting that defendants agree to accept service of that complaint. See id. at ¶ 16 and Ex. E thereto. On January 30, 1991, plaintiffs' counsel was notified, in writing, that defendants would not consent to service of the proposed amended complaint. See id., at Ex. F thereto. Defendants offered several reasons for their refusal. They stated that many of the causes of action contained in the proposed amended complaint were "deficient" because they failed to state a

claim upon which relief could be granted. Id. Defendants also stated that they would be prejudiced because the proposed amended complaint seeks to add claims beyond the scope of the discovery, which has already been conducted and is now closed (also pursuant to the terms of that court approved stipulation). Thus, because defendants would not consent to plaintiffs amending their complaint, plaintiffs filed the present motion to amend on March 1, 1991.

Plaintiffs are seeking leave to amend their complaint to supplement existing causes of action and to add two new causes of action. Plaintiffs are seeking to add a cause of action for breach of the implied covenant of good faith and fair dealing. They are also seeking to add a cause of action based upon defendants alleged withholding and falsifying of business

records. Finally, plaintiffs' proposed amended complaint seeks to increase the amount of damages sought. Defendants have cross-moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12 (c) seeking dismissal of all causes of action set forth in the original complaint, with the exception of the breach of contract cause of action. Defendants contend that those causes of action are preempted by the Carmack Amendment to the Interstate Commerce Act. The defendants strenuously oppose plaintiffs' motion to amend arguing, among other things, that any proposed amendment is futile because the additional causes of action which plaintiffs are seeking to add are also preempted by the Carmack Amendment. (At the request of counsel, these motions were taken on a submit basis with no oral argument.)

Ordinarily the court would address the motion to amend at the outset since it was filed first. As will be seen, however, because an analysis of that motion is bound up with defendants' cross-motion, the court will address the latter motion first, and then go on to consider the motion to amend.

DISCUSSION

Before undertaking an analysis of the substantive issues raised by these motions, there is one minor procedural issue which, given the amount of time devoted to it by plaintiffs' counsel, the court is compelled to comment upon - and this is the timeliness of the motion to amend. Apparently anticipating an argument by defendants that the motion to amend was not timely, plaintiffs expended quite a bit of effort arguing that their motion was timely.

It is true that plaintiffs technically did not comply with the court approved stipulation of the parties calling for any motions to amend to be filed on or before February 18, 1991. However, based upon the representations of plaintiffs' counsel mentioned earlier, regarding his attempts to obtain defense counsel's consent to serve an amended complaint, the court the finds that plaintiffs complied with the spirit of that stipulation. Therefore, even though plaintiffs did not file their motion to amend until March 1, 1991, a week and a half after the time provided for in the stipulation, the court will consider such motion and will not deny it as untimely - especially given the fact that in their motion papers defendants did not specifically object to plaintiffs' motion a untimely.

I. JUDGMENT ON THE PLEADINGS

A. Carmack Amendment Preemption

The court is now free to turn to the heart of this case, and that is the effect, if any, of the Carmack Amendment on plaintiffs' various causes of action.[6] The defendants claim that they are entitled to

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[6] The portions of the Carmack Amendment relevant to these motions are as follows:

> A common carrier ... subject to the jurisdiction of the Interstate Commerce Commission ... shall issue a receipt or bill of lading for property it receives for transportation ... That carrier ... and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission ... are liable to the persons entitled to recover under the receipt or bill of lading. The liability imposed under this provision is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States...

49 U.S.C. § 11707 (a)(1) (West 1991 Pamphlet).

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

49 U.S.C. § 10103 (West 1991 Pamphlet).

judgment on the pleadings because all of the original causes of action alleged in the complaint, with the exception of one, are preempted by the Carmack Amendment. The plaintiffs advance two arguments in opposition to defendants' motion. The underlying premise to the plaintiffs' first argument is that the Carmack Amendment is not triggered unless there is a valid bill of lading in existence between the shipper and the carrier. Based on that premise, plaintiffs then assert that as a result of the defendants' fraud, negligent misrepresentation and failure to comply with a certain federal regulation, there was no valid bill of lading.[7] Thus, in

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[7] The court observes that although this is the position articulated by plaintiffs in their motion papers, it is somewhat inconsistent with the relief sought in the complaint. Despite the fact that plaintiffs seek a variety of different types of relief in their complaint, nowhere do they specifically state that they are seeking to have the bill of lading voided on the basis of fraudulant inducement or negligent misrepresentation. (Arguably the complaint does

plaintiffs' view, defendants are not entitled to rely on the preemptive effect of the Carmack Amendment. Secondly, plaintiffs argue that even if the court finds that a valid bill of lading exists, the limited scope of preemption under the Carmack Amendment does not preclude their state and common law causes of action.

The Carmack Amendment plainly requires common carriers to issue bills of lading for property received for transportation. 49 U.S.C. § 11707 (a)(1). That statute also clearly states that common carriers "[a]re liable to the person entitled to recover under the bill of lading." Id. (emphasis added). The obvious implication of that language is that in the absence of a bill of lading, a carrier's liability is not governed by the Carmack Amendment.

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seek to have the bill of lading voided based upon defendants' alleged non-compliance with 49 C.F.R. § 1056.2. See Complaint at 11 ¶ 1(b).

Clearly the majority view with respect to the preemptive scope of the Carmack Amendment is that that Amendment preempts state law claims for breach of contract and negligence. See Underwriters at Lloyds of London v. North American Van Lines, 890 F. 2d 1112, 1120-21 (10th Cir. 1989) and (cases cited therein): see also Intech. Inc. v. Consolidated Freightways, Inc., 836 F. 2d 672, 677 (1st Cir. 1987); Hughes Aircraft Co. v. North American Van Lines, 758 F. Supp. 555, 559 (N.D. Cal. 1990); Roadway Express, Inc. v. Fuente Cigar, Ltd, 749 F. Supp. 248, 255 (S.D. Fla. 1990), leave to appeal granted, 925 F. 2d 370 (11th Cir. 1991); and Urban Electrical Co. v. Cable Index, 735 F. Supp. 29, 32 (D. Mass. 1990).[8] Although those courts have

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[8] The Second Circuit has not yet had the opportunity to address the precise issue of the preemptive effect of the Carmack Amendment. In North Am. Phillips Corp. v.Emery Air Freight Corp., 579 F. 2d 229, (2d Cir. 1978), the Second

not expressly addressed the issue of whether, as plaintiffs contend, a valid bill of lading is a precondition to triggering application of the Carmack Amendment, in several of those cases, by emphasizing the existence of a bill of lading, the courts strongly implied that a bill of lading is required before the effect of the Carmack Amendment becomes an issue.

In Lloyds of London, for example, the Tenth Circuit found a valid bill of lading

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Circuity did hold, however, that plaintiff's claims based upon the loss of goods during interstate transportation by the defendant common carrier set forth a claim arising under federal law. In so holding, the Court reasoned:

> Congress has created a broad comprehensive scheme covering the interstate shipment of freight, aimed at preventing preferential treatment among shippers and establishing national equality of rates and services. this has occupied the field to the exclusion of state law.

Id. at 233-34 (citations omitted) (emphasis added). That reasoning suggests at least in this court's view, that if faced with the issues of Carmack Amendment preemption, this circuit would follow the majority view.

where the shipper had "knowledgeably bargained for" a limitation with respect to the carrier's liability and corresponding freight rate. 890 F. 2d at 1114. The Court then went on to hold that the Carmack Amendment preempted state common law remedies against the common carrier for negligent loss or damage to goods during interstate shipment. The view that a bill of lading is necessary before the Carmack Amendment is implicated was further reinforced by the Tenth Circuit one year later in A.T. Clayton & Co. v. Missouri-K.T.R. Co., 901 F. 2d 833 (10th Cir. 1990), where, acknowledging its earlier holding in Lloyds, the Court held that the Carmack Amendment applied where goods were shipped under a "lawful bill of lading." Id. at 834. Similarly, in Air Products & Chemicals, Inc. v. Illinois Central Gulf R.R., 721 F. 2d 483 (5th Cir. 1983), cert.

denied, 469 U.S. 832, 105 S. Ct. 122, 83 L. Ed. 2d 64 (1984), the Fifth Circuit held that "[t]he Carmack Amendment, as judicially interpreted, provides an exclusive remedy for breach of contract of carriage provided by a bill of lading ..." Id. at 487 (emphasis added). In a slightly different context, in Hughes v. United Van Lines, Inc., 829 F. 2d 1407 (7th Cir. 1987), cert. denied, 485 U.S. 913, 108 S. Ct. 1068, 99 L.Ed.2d 248 (1988), the Seventh Circuit held that because "[p]laintiffs were provided a valid bill of lading prior to transporting their goods," the carrier "[s]usccessfully limited its liability under the Carmack Amendment ..." Id. at 1423-24. Thus, in light of the foregoing, the court is of the opinion that the Carmack Amendment does not come into play unless a valid bill of lading exists between the shipper and the carrier.

Having determined that a valid bill of lading is a necessary predicate to application of the Carmack Amendment, the next issue is whether such a bill of lading existed in the present case. Defendants did not address this issue, limiting their analysis instead to a recitation of the case of law set forth above regarding the preemptive scope of the Carmack Amendment. As previously noted, however, plaintiffs contend that due to defendants' fraud, negligent misrepresentation, and failure to provide certain information required by 49 C.F.R.§ 1056.2, no valid bill of lading existed. Therefore plaintiffs contend that the Carmack Amendment cannot, as defendants insist, preempt plaintiffs' claims.

It is well settled that a bill of lading"'[s]erves both as a receipt and as a contract.'" A/S Dampskibsselskabet Torm v. Beaumont Oil Ltd., 927 F.2d 713, 717 (2d

Cir.), cert. denied, 112 S. Ct. 183, 116 L.Ed.2d 144 (1991), (quoting Louisville & N.R.R. v. Central Iron & Coal Co., 265 U.S. 59,67 (1924)). As a contract, a bill of lading is subject to the general rules of construction which govern other contracts. Texas & P.R. Co. v. Reiss, 183 U.S. 621, 22 S. Ct. 252, 46 L.Ed. 358 (1902). Because this is a diversity action, the court must look to the law of the forum state, i.e., New York, in deciding the existence of a valid contract. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938).

Plaintiffs are correct in asserting that any contract may be set aside for fraud. Aplications Inc. v. Hewlett-Packered Co., 501 F.Supp. 129, 134 (S.D.N.Y. 1980) (citations omitted), aff'd, 672 F.2d 1076 (2d Cir. 1982). In the present case, however, because the defendants are moving

for judgment on the pleadings, there is nothing in the record, other than the bare allegations in both the original and in the proposed amended complaint, pertaining to plaintiffs' claims of fraudulent inducement and negligent misrepresentation. Accordingly, at this stage of the proceedings, because the court is unable to ascertain whether a lawful, valid bill of lading existed between plaintiffs and defendants, the court must deny defendants' Rule 12 (c) motion insofar as they are seeking dismissal of the causes of action based upon negligence and gross negligence.

The plaintiffs' claim for fraudulent inducement and negligent misrepresentation stand in a different posture, however. That is so because notwithstanding the majority view that the Carmack Amendment provides the exclusive remedy for damages resulting from the loss of, or injury to,

goods transported by an interstate carrier, at least one jurisdiction has demarcated a well-reasoned boundary between the scope of preemption under the Amendment and the existence of state statutory and common law causes of action. In particular, in Sokhos v. Mayflower Transit, Inc., 691 F.Supp. 1578 (D. Mass. 1988), the court stated that the "[C]armack Amendment preempts only those state common or statutory bases of relief premised upon the liability of an interstate motor carrier for damages or loss of goods being transported in interstate commerce." Id. at 1581 (citing Adams Express Co. v. Croninger, 226 U.S. 491, 507, 33 S.Ct. 148, 152, 57 L.Ed. 314 (1912)). The court in Sokhos went on to reason that because plaintiffs' state common law claim for international or negligent misrepresentation, alleging fraud or mistake in connection with the formation

of the shipping contract, did not relate to loss or damages to plaintiff's goods, those claim were not preempted by the Carmack Amendment. Id. at 1582 (emphasis added) (citing Chandler v. Aero Mayflower Transit Co., 374 F.2d 129, 135 (4th Cir. 1967)). Similarly, in Mesta v. Allied Van Lines International, Inc., 695 F. Supp. 63 (D.Mass. 1988), the court held that plaintiff's state statutory claim for unfair and deceptive acts and practices was to preempted by the Carmack Amendment, because defendant's liability thereunder was not based on loss of property, "[b]ut on the defendant's actions in investigating and responding to the plaintiff's claim." Id. at 65.

Applying that reasoning to the present case, plaintiffs' claims of fraudulent inducement and negligent misrepresentation, to the extent that they do not seek to

recover damages inconsistent with the Carmack Amendment, should not be dismissed as being preempted by that Amendment. Such interpretation is consonant with the pain language of the Carmack Amendment and the case law interpreting that Amendment.

Without specifically holding at this juncture that the Carmack Amendment preempts any of plaintiffs' causes of action, the parties should be aware that if it is ultimately determined that a lawful, valid bill of lading did exist in this case, then the court will undoubtedly follow the majority view and dismiss plaintiffs' fifth and sixth causes of action as being preempted by the Carmack Amendment. The fifth cause of action is for negligence and the sixth is for gross negligence. Those claims should be dismissed, if a valid bill of lading existed, because they are essentially state

common law claims for direct or consequential injuries arising from the loss of, or damage to, property carried under a bill of lading; and as such those claims would be preempted by the Carmack Amendment. None of this of course is to suggest that plaintiffs will not necessarily prevail on the merits of their fraud and negligent misrepresentation claims. That remains to be seen.

The court is fully aware that plaintiffs' first cause of action, which they define as "defendants' failure to meet its regulatory responsibility,"[9] is not mentioned in the foregoing discussion. That is because the parties did not bother to specifically address this cause of action. Putting aside for a moment Carmack Amendment preemption, the court still has reservations about the viability of this

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[9] See Complaint at 10, ¶ 1.

cause of action. However, because defendants did not specifically address the regulation based cause of action on this motion, the court is not satisfied that they are entitled to judgment on the pleadings with respect to this particular cause of action. Therefore the court will permit this cause of action to stand for now.

To summarize, defendants' motion for judgment on the pleadings is denied without prejudice because whether plaintiffs' negligence based causes of action are preempted by the Carmack Amendment cannot be resolved at this juncture; and the court refuses to dismiss plaintiffs' first cause of action without having the benefit of the parties analysis of that cause of action.

II. AMENDMENT OF THE COMPLAINT

As previously mentioned, plaintiffs are seeking leave to amend their complaint to

add two new causes of action: one for breach of implied covenant of good faith and fair dealing[10] and a second for fraud in withholding and falsifying business

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[10] This proposed cause of action alleges, in relevant part:

> Defendants breached this implied covenant of good faith and fair delaying by failing to inform plaintiffs of the terms and conditions of the RCP plan, by failing to notify plaintiffs of the reloading and delay in shipment of plaintiffs [sic] goods, by intentionally and fraudulently completing shipping forms erroneously, by failing to acknowledge communications regarding plaintiffs' claims, by not attempting in good faith to effectuate a prompt, fair and equitable settlement of plaintiffs' claims for loss and damage once liability had become reasonably clear, by failure to offer a proposed settlement within the 120 days as required by regulations, by failing to adjust plaintiffs [sic] claim in accordance with defendants [sic] own standard for fair and equitable settlement, by attempting to settle plaintiffs' claim for less than the amount to which a reasonable person would have believed he was entitled to based upon the oral and written representations of defendants [sic] by compelling plaintiffs to institute litigation to recover amounts due under the RCP plan by offering substantially less then [sic] the actual value of the claim and by engaging in bad faith litigation practices to further wear down and wear out plaintiffs.

Affidavit of William J. Dreyer (March 15, 1991), Ex. C thereto (Proposed Amended Complaint) at 13-14, ¶ 55.

records. Defendants oppose this motion on the sole basis that plaintiffs should not be allowed to amend their complaint to include those two causes of action in that such amendment would be futile because those causes of action are preempted by the Carmack Amendment.

According to Rule 15 of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a) (emphasis added). Relying upon the seminal case of Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed2d 222 (1962), the Second Circuit has stated that "[s]uch leave will be denied when an amendment is offered in bad faith, would cause undue delay, or would be futile." Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1198 (2d Cir. 1989). Whether the other party would be substantially prejudiced is also a factor.

Foman, 371 U.S. at 182, 83 S.Ct. at 230. The court will first consider futility. An analysis of that factor again requires the court to consider the breadth of preemption under the Carmack Amendment. If, as defendants contend, those proposed causes of action are statutorily preempted, then allowing plaintiffs to amend their complaint to add such causes of action would obviously be futile and plaintiffs should not be allowed to do so.

With respect to the first proposed cause of action (breach of the implied covenant of good faith and fair dealing), as plaintiffs pointed out, at least one court has recognized that although the contract at issue therein was governed by federal law, "[i]t nevertheless has the same implied covenant of good faith and fair dealing that inures in every contract." Drucker v. O'Brien's Moving and Storage

Inc., 745 F. Supp. 616, 619 (D. Nev. 1990). More specifically, the court held that, "[u]nder this bill of lading and its terms and federal regulations, Bekins [the defendant carrier] had a specific obligation to deal fairly and in good faith with the plaintiffs with respect to the claim for damages which Mr. Drucker [plaintiff] made and documented." Id. Replying in part upon 49 U.S.C. § 10103, which states that other remedies are not precluded by the Carmack Amendment, the Drucker court allowed plaintiffs to recover punitive damages from the carrier based upon a finding that the carrier "deliberately and intentionally" refused to consider plaintiffs' claim in good faith. Id. at 622.

Likewise, in the present case, the court agrees with plaintiffs that under the circumstances, plaintiffs are entitled to

assert a cause of action for breach of the implied covenant of good faith and fair dealing. Allowing plaintiffs to assert such a cause of action is wholly consistent with the line of cases set forth herein where the courts held that causes of action which are not premised upon the carrier's liability for damage to or preempted by the Carmack Amendment. Therefore, because the proposed first cause of action is not preempted by the Carmack Amendment, amending the complaint to include that cause of action would not be futile.

With respect to plaintiffs' second proposed cause of action (fraud in the withholding and falsifying of business records), plaintiffs should also be allowed to assert that cause of action because it would not be preempted by the Carmack Amendment. Assuming for the sake of argument that that cause of action is

otherwise viable,[11] the court concludes that it would not be preempted by the Carmack Amendment because the damages which plaintiffs are seeking under that cause of action are unrelated to the actual damages which they sustained as a result of loss or damage to their household goods and personal belongings. See Sokhos, 691 F. Supp. at 1582. Thus, defendants cannot defeat plaintiffs' motion to amend on the ground that the Carmack Amendment preempts the two newly proposed causes of action.

At this point the court would ordinarily focus on the other factors relevant to a determination of whether an amendment should be allowed, such as bad faith, undue delay and substantial prejudice. However, because although in correspondence defense

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[11] Given the fact that defendants have not suggested any basis for their futility argument other than Carmack Amendment preemption, the court declines to speculate as to whether this cause of action may be futile for other reasons.

counsel did mention delay and prejudice as reasons for refusing to accept service of the amended complaint, those reasons do not form the basis for defendants' opposition to plaintiffs' motion to amend. See Defendants' Memorandum of Law at 12-13. Therefore the court need not be overly concerned with these other factors, although it will briefly address them.

As the plaintiffs correctly noted, this case will not be unduly delayed by allowing an amendment because many, if not all, of the facts relating to the two new proposed causes of action have already been uncovered through discovery. In addition, the court cannot conceive of any substantial prejudice to these defendants where they should have been aware of the facts underlying the new causes of action for quite some time. Moreover, the proposed amended complaint also seeks to

amplify the allegations in the original complaint which will actually assist defendants. Consequently, because it would not be futile to allow plaintiffs to add the two new proposed causes of action, and because amendment of the complaint will not unduly delay this case or substantially prejudice defendants; and because there has not even been a suggestion that plaintiffs' motion to amend was not undertaken in bad faith, that motion to amend is granted.

There is one significant limitation, however, and that is with respect to the nature of the damages recoverable under the two new proposed causes of action. Plaintiffs will not be allowed to amend their complaint to include damages under that cause of action which are inconsistent with the Carmack Amendment. For example, in the proposed amended complaint currently before the court, plaintiffs are expressly

seeking damages "[f]or loss of and damage to the plaintiffs' household goods and belonging; ..." Dreyer Affidavit, Ex. C thereto at 19, ¶ 5(a). Based upon the case law discussed herein, recovery of those types of damages is precluded by the Carmack Amendment. Thus, to the extent that plaintiffs are seeking damages inconsistent the with the Carmack Amendment, amendment of their complaint will not be allowed.

CONCLUSION

For the reasons set forth above, defendants' motion for judgment on the pleading is denied without prejudice. Plaintiffs' motion to amend their complaint is granted. Plaintiffs are directed to file and serve an amended complaint in accordance with this decision no later than thirty days from the date hereof.

IT IS SO ORDERED.

DATED: February 13, 1992
Syracuse, New York

/s/

Neal P. McCurn
Chief, U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Plaintiffs,

-v- 89-CV-531

NORTH AMERICAN VAN LINES, and
BELTMAN NORTH AMERICAN CO., INC.,

Defendants.

RALPH W. SMITH, JR.
United States Magistrate

ORDER

By letter of March 2, 1990, the Honorable Neal P. McCurn, Chief Judge of this Court referred a discovery dispute between the parties to the undersigned for resolution and determination pursuant to 28 U.S.C. § 636(b)(1)(A). That dispute was described in a letter of February 22, 1990, from plaintiffs' counsel to Judge McCurn. As a result of that reference, I convened a

discovery conference on June 1, 1990, which was attended by plaintiff, Donald L. Cleveland, Kenneth L. Ayers, Esq., counsel for the plaintiffs, and Lenora Gerald, Esq., an associate attorney in the office of Piken & Piken, counsel for the defendants. A second conference was convened on June 15, 1990, attended by the same persons except that Ms. Gerald was replaced by Kenneth Piken, Esq. The June 15 conference was scheduled by my Order of June 5, 1990, which directed Mr. Piken to appear personally and produce certain discovery items. Mr. Piken was also directed to file a brief or memorandum as to why attorneys' fees and costs and disbursements in the total sum of $8,845 as well as sanctions should not be awarded to the plaintiffs. The June 15, 1990 conference was held in open court and recorded electronically.

The instant action is a diversity action brought by plaintiffs to recover damages for injury to their personal household property damaged during a cross-country transport by defendants. Before the Court is an application by plaintiffs for sanctions and attorney's fees and a demand by defendants for sanctions pursuant to Fed. R. Civ.P. 11.

In reviewing the discovery demands and defendants' responses thereto in considerable detail, this Court has determined that sanctions in the form of attorneys' fees pursuant to Rule 37(a) and (d) of the Federal Rules of Civil Procedure should be awarded to plaintiffs against defendants and counsel for defendants jointly and severally in the amount of $4,000.

The broad scope of discovery delimited by the Federal Rules of Civil Procedure is

designed to achieve disclosure of all the evidence relevant to the merits of a controversy. See Fed. R. Civ. P. 26(b)(1); see also Advisory Committee's explanatory statement concerning amendments of the discovery rules, 48 F.R.D. § 487, 497-508 (1970). Discovery was designed to proceed at the initiative of the parties with a minimum of court intervention. Id. at 488. The rule makers framed Rule 37 in recognition of the potential for abuse during the discovery process. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curium); Thomas E. Hoar, Incorporated v. Sara Lee Corporation, et al., 882 F.2d 682,687 (2d Cir. 1989).

Attorney's fees are also justified under 28 U.S.C. § 1927. Advocacy simply for the sake of burdening an opponent with unnecessary expenditures of time and effort

clearly warrants recompense for the extra outlays attributable thereto. Lipsig v. National Student Marketing Corporation, 663 F. 2d 178, 181 (D.C. Cir. 1980). Section 1927 entitled "Counsel" Liability for Excessive Costs" provides that any attorney or other person admitted to conduct cases who so multiply the proceedings in any case unreasonably and vexaciously may be required by the Court to satisfy personally the excess costs, expense, and attorney fees reasonably incurred because of such conduct. 28 U.S.C. § 1927. The purpose of this statute is to deter unnecessary delays in litigation. Oliveri v. Thompson, 803 F. 2d 1265, 1273 (2d Cir. 1986). Imposition of a sanction under paragraph 1927 requires "a clear showing of bad faith," id.; Kamen v. American Telephone and Telegraph Co., 791 F. 2d 1006, 1010 (2d Cir.1986). An award under this section is proper when the

attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay. Oliveri, 803 F. 2d at 1273.

The record in the instant matter is replete with failures by defendants and defense counsel to cooperate with the discovery process including this Court's order of March 27, 1990, entered upon counsel's stipulation (Exhibit 15).

For example, on November 3, 1989, plaintiff served a request for production of documents pursuant to Fed. R. Civ. P. 34(a). Item 6 of that request required production of "any claims procedure manual, notes on procedures, memoranda or other instructions given to or used by personnel handling claims on behalf of defendants." (See Exhibit 1 of "Exhibits in Support of Plaintiff's Presentation at a Hearing on

June 15, 1990 at Exhibit 1").[1] In his signed response dated January 17, 1990 (Exhibit 6), attorney Piken stated "defendants are not in possession of such documents." Thereafter, during a deposition of Richard Smoldt, general manager of defendant North American Van Lines (NAVL), Smoldt acknowledged that there was a claims procedure manual located in their office. (Exhibit 19, p.21). Similarly, in a deposition of a non-party witness, Andrea Daley (Exhibit 7), president of Restorers of America, Inc., a cargo claims appraisal firm and agent of NAVL stated that there was a "big manual" describing procedures or systems used in adjusting claims and which was kept updated. She noted that this contained "everything to proceed for taking pictures,

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[1] All exhibits hereafter cited solely by Exhibit number are contained in this collection of exhibits.

for doing appraisals, all your instructions and information that they (NAVL) need. It's very well defined." Ms. Daley subsequently provided plaintiffs' counsel with three pages of that manual and from a private investigator, plaintiffs' counsel subsequently obtained the complete chapter on claims from the agency manual (see Exhibits 27, 28). On examination of that manual, it is apparent that it relates to procedures used in adjudicating or investigating cargo claims against NAVL and clearly falls within the language of item 6 of the discovery demand and within the terms of the discovery stipulation and order of March 27, 1990. It is not, as defense counsel continues to insist, a "repair" manual.

In a letter to plaintiff's counsel from defense counsel's associate attorney on February 8, 1990, she states that "as for

the handbook of guidelines/and or procedures for damage claims, I will discuss this with NAVL and provide it or advise you of defendant's reason for its non-disclosure." (Exhibit 10). Thereafter, in a discovery stipulation executed by counsel and so ordered by this Court on March 27, 1990, it was agreed that defense counsel would produce "a copy of any claims manual, claims procedure handbook or list of instruction used by defendants or their agents in handling cargo claims (originally requested as item #6, November 3, 1990 request) ..." Yet, in a subsequent letter of April 6, 1990, attorney Piken stated that as to such a claim manual or other procedures handbook, "none exists". (Exhibit 16). Despite the overwhelming evidence that such a manual of the documents requested in plaintiffs' initial request for documents, attorney

Piken argued at the June 15, 1990 discovery conference that there is no such document. In failing to produce this manual, I find that defendants and/or defendants' counsel violated the March 27, 1990 order and the intent of the statutory discovery scheme.

As another instance of defendants' grossly improper practices, the matter of the production of certain photographs is illuminating. Again, plaintiffs in their request for the discovery of documents of November 3, 1989 sought in item five" ...photos...relating to the claim." In defendants' January 17th response to plaintiffs' request (Exhibit 6), defendants' provided photocopies, 67 photographs of allegedly damaged items resulting from the move. Meanwhile, in a letter dated February 8, 1990, attorney Piken advised attorney Ayers (Exhibit 10) that "the photos taken by Ms. Daley will be

provided to plaintiffs at their expense." Meanwhile, Ms. Daley in her deposition advised that she had forwarded the original photographs to NAVL on October 13, 1988 (Exhibit 7 at p. 28). On January 26, 1990. during a meeting between plaintiffs' counsel and attorney Gerald for the defendants, Ms. Gerald apparently agreed to provide duplicate photographs. This is confirmed in the Ayers letter of February 6, 1990 (Exhibit 9), and as noted were to be provided at plaintiff's expense per Mr. Piken's letter of February 8, 1990 (Exhibit 10). In the subsequent stipulation concerning discovery, so ordered by the undersigned (Exhibit 15, item 3 (d)), defense counsel agreed to provide original photographs or negatives if in possession of the defendants or if not, to request them from Restorers of America (Andrea Daley's firm). However, on April 6, 1990,

attorney Piken advised that "defendants cannot produce the original photos or negatives." (Exhibit 16).

Fortuitously, at the June 15, 1990 hearing, attorney Piken advised that he did not know Andrea Daley but had gotten the photographs from NAVL, those not being the originals but instead duplicate originals provided by Ms. Daley. Mr. Piken went on to advise that the original photographs were never in NAVL's possession but instead were produced at the June 15, 1990 hearing as a result of Piken's insistence in a number of telephone conversations he personally conducted with Ms. Daley between April 9, 1990 and June 15, 1990. In response to this, counsel for the plaintiff has provided an affidavit of Andrea Daley sworn on June 26, 1990, in which she reiterates that she forwarded all original photographs to NAVL on or about October 11, 1988, may

or may not also have forwarded the negatives but has not at any time since her deposition on January 26, 1990, been contacted by anyone from Mr. Piken's office to inquire as to the photographs. While this Court would like to believe that this was simple error on defense counsel's part, the sequence of events leads to the only logical conclusion that this was yet another effort by defendant or defense counsel to obstruct plaintiffs' prosecution of this matter.

Plaintiff in his February 14, 1990 request for documents (Exhibit 8) requested (item 1) "the dispatch ticket or load assignment and/or other documents which would indicate the driver of the vehicle(s) originally scheduled to pick up, load and deliver plaintiffs' household goods." In response to this, Mr. Piken advised "defendants are not in possession of any

documents which would indicate the driver of the vehicle(s) orginally scheduled to pick up, loan (sic) and deliver plaintiff's warehouse goods." (Exhibit 18). These documents were originally identified in the deposition of Harry Bevington (Exhibit 2, p. 37) on December 7, 1989, who stated that such documents were normally kept. At his deposition on April 20, 1990, General Manager Smoldt indicated that such a record existed and agreed to produce it. (Exhibit 19, p.44). Although it appears from an exchange of letters between Iowa counsel for plaintiff and Iowa counsel for defendants that it was agreed that these documents would be produced by Smoldt if counsel permitted and that while Iowa counsel was prepared to do so, New York counsel, presumably Mr. Piken, was not. (See Exhibit 24, 25 & 26). Interestingly, these documents were provided by Mr. Piken

at the June 15, 1990 conference with a claim, disputed by plaintiffs' counsel, that they had previously been provided. Again, although it would appear these are clearly relevant, they were not provided until ultimately under the second court order directing production on June 15,1990.

These are but some of the examples of the continuing refusal by the defendants and Mr. Piken to cooperate with discovery, thus necessitating the expenditure of considerable effort and expense on the part of plaintiffs and counsel. To track the progress of other items of discovery is not productive. However, suffice it to say that several other examples of "foot-dragging" and "stonewalling" are found in this litigation, all by defendants or defense counsel.

Counsel for plaintiffs has submitted an itemization showing the expenses incurred

as a result of defendants' lack of cooperation. The number of hours claimed is substantial. However, to devote the time necessary to review this submission segregating out those hours which pertain specifically to the discovery aspects of this matter would be counterproductive and a further waste of scarce judicial resources of which too much have already been expended in this case. I would note that in a previous instance in this litigation, Judge McCurn granted defendants motion to vacate an entry of default on condition that defendants make payment to the plaintiffs' attorney of costs and attorney's fees. It appears that defendants have established a pattern of non-compliance in this action.

In reviewing plaintiffs' claim I find, therefore, that defendants and defense counsel have together engaged in a

continuing series of acts designed to frustrate the discovery process in a deliberate attempt to obstruct plaintiffs' prosecution of this litigation. This conduct justifies the award of the totally reasonable amount of attorney's fees previously determined herein.

Insofar as plaintiffs claim entitlement to depose John Thompson in New York at the expense of the defendants, I find they have not made a sufficient showing to require defendants to produce him in this state. Defendants are, however, to use their best efforts to locate and provide his whereabouts since he is apparently employed by an agent of one of the defendants. His current address should be available since he works for an agent of a defendant, Apollo. This information is to be provided to plaintiffs' counsel forthwith.

The deadline for discovery is hereby extended to October 26, 1990, and counsel are to use their best efforts to ensure that requests for admissions, interrogatories, or documents are reasonable and are complied with promptly so that no further disputes need attention by the Court.

Based on the above findings, it is

ORDERED, that defendants pay attorney's fees in the amount of $4,000 to the plaintiffs within 30 days of the date of this Order, and it is further.

ORDERED, that defendants' oral demand for sanctions against plaintiffs' counsel is denied as totally without foundation, and it is further

ORDERED, that the deadline for completion of discovery is hereby extended to October 26, 1990.

DATED: August 28, 1990
Albany, New York

/s/

Ralph W. Smith, Jr.
UNITED STATES MAGISTRATE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

Donald L. Cleveland and
Christa A. Cleveland,

Plaintiffs,

-against-

North American Van Lines, Inc. and
Beltman North American Co. Inc.

Defendants.

ORDER

File No. 89-CV-531

Judge McCurn

Defendants' appeal under Federal Rule of Civil Procedure 72(a) to review a ruling of the Magistrate on a discovery matter and plaintiffs' answer and cross-appeal came on for hearing before the Court, Honorable Neal P. McCurn, District Judge, presiding, on November 27, 1990 and the issues having

been duly heard and a decision having been duly rendered,

It is **Ordered** that defendants' appeal to vacate or modify the Magistrate's Order dated August 28, 1990 is denied; and

It is further **Ordered** that plaintiffs' appeal to modify the Magistrate's Order dated August 28, 1990 is granted solely to the extent of increasing the award of attorney's fees to plaintiffs and against defendants and counsel for the defendants, jointly and severally, to five thousand eight hundred and sixty dollars ($5,860).

It is further **Ordered** that defendants and defense counsel shall make payment to plaintiffs' attorney of the attorneys' fees awarded herein within 30 days of the date this order is signed;

It is further **Ordered** that plaintiffs' request for attorneys fees in

connection with defendants' appeal of the Magistrate Order of August 28, 1990 is denied.

Dated at Syracuse, New York this 8 th day of December 1990.

NEAL P. MCCURN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Plaintiffs,

-v- 89-CV-531

NORTH AMERICAN VAN LINES, and
BELTMAN NORTH AMERICAN CO., INC.,

Defendants.

APPEARANCES: OF COUNSEL:

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Frederick J. Scullin, Jr., D.J.:

Memorandum-Decision and Order

Background

This case arises from the transportation of the plaintiffs' household goods from

West Des Moines, Iowa to Slingerlands, New York in August 1988. Prior to this move, the plaintiffs entered into a written shipping contract (also referred to as a bill of lading) with the defendant, North American Van Lines, Inc. [hereinafter referred to as "NAVL"], a "common carrier" as that term is defined by 49 U.S.C. § 10102. This bill of lading included the following provisions:

> "The contract is subject to all the regulations, rates and charges, and carrier's current effective applicable tariffs on file with the Interstate Commerce Commission, including but not limited to, the following terms and conditions:
>
> Section 1. The carrier shall be liable for physical loss of or damage to any article from external cause while being carried or held in storage or transit ...
>
> Subject, in addition to the foregoing, to the further following limitations on the carrier's liability:
>
> The carrier's maximum liability shall be either:

> (1) The amount of the actual loss or damage not exceeding $1.25 times the weight (in pounds) of the shipment, or the lump sum declared value, whichever is greater; or (2) the actual loss or damage not exceeding 60 cents per pound of weight of any lost or damaged article when the shipper has released the shipment to carrier, in writing, with liability limited to 60 cents per pound per article."

In addition to the bill of lading, the plaintiffs purchased, for an additional $320 charge, replacement cost protection [hereinafter referred to as "RCP"], providing for protection of their property up to $50,000. The RCP offered the plaintiffs, as the shippers of the goods, the repair, replacement or one hundred percent reimbursement at current prices without depreciation for any goods damaged or lost during transport.

During the course of the move, various of the plaintiffs household goods were damaged. Plaintiffs filed a claim for their damages and loss, but were unable to

reach a mutually agreeable settlement with the defendant.

The plaintiffs initiated this lawsuit by filing their complaint on April 26, 1989. Jurisdiction is grounded on diversity of the parties and upon the existence of a federal question. In their original complaint, the plaintiffs alleged six causes of action, in which they seek a refund of the $320 cost of the RCP,. $36,000 for the damages and loss of their household goods, $350 for the expenses they incurred as a result of the delay in delivering their belongings, $500,000 in punitive damages, costs, disbursements and attorney's fees. Thereafter, the plaintiffs' motion to amend their complaint was granted and the plaintiffs added two additional causes of action, added a request for the refund of the shipping

costs and increased their punitive damage award to $2 million.

As a cross-motion to the plaintiffs' motion to amend their complaint, the defendants moved to dismiss. That motion was denied. Cleveland v. North Amer. Van Lines, Inc., No. 89-CV-531 (N.D.N.Y. 1992) (McCurn, C.J., presiding) [hereinafter referred to as Cleveland I"]. One of the issues raised in this motion was that the Carmack Amendment[1] preempted all of the

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[1] The portions of the Carmack Amendment to the Interstate Commerce Act relevant to the instant motions read in pertinent part as follows:

> "A common carrier ... subject to the jurisdiction of the Interstate Commerce Commission ... shall issue a receipt for bill of lading for property and receipt for transportation .... That carrier ... and any other carrier that delivers the property and is providing transportation service subject to the jurisdiction of the Commission ... are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed ... is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported ...

49 U.S.C. § 11707(a)(1).

plaintiffs' claims. Chief Judge Neal P. McCurn held that inasmuch as there was no bill of lading then before the court, it could not be determine whether the Carmack Amendment preempted the plaintiffs' causes of action sounding in negligence and gross negligence. Id. at 11. However, Judge McCurn ruled that, in any event, the Carmack Amendment did not preempt the plaintiffs' fraudulent inducement and negligent misrepresentation causes of action. Id. at 13. In dicta, Judge McCurn stated that

> "the parties should be aware that if it is ultimately determined that a lawful, valid bill of lading did exist in this

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"A common carrier may limit its liability for loss or injury of property tranported ..."

Id. at § 11707(d).

"Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

Id. at § 10103.

> case, then the court will undoubtedly follow the majority view and dismiss plaintiffs' fifth [for negligence] and sixth [for gross negligence] causes of action as being preempted by the Carmack Amendment." Id.

Following this decision by Chief Judge McCurn, issued on February 13, 1992, the plaintiffs filed their amended complaint.

In preparing for the trial of this matter, the parties have stipulated to various aspects of the case. Those stipulations include the existence of a lawful, valid bill of lading. In addition, the plaintiffs have withdrawn those causes of action which they believe to have been determined by Judge McCurn to be preempted by the Carmack Amendment. As such, the following is a list of the remaining causes of action:

(1) that the defendants failed to meet their regulatory responsibility, in that they failed to provide the plaintiffs with the information required as set out by 49 C.F.R. §§ 1056 et seq., thereby denying claims of meaningful choice of insurance coverage;

(2) negligent misrepresentation and breach of defendants' contractual and regulatory duty to represent accurately the terms and conditions of the shipping contract and RCP, thereby depriving the plaintiffs of a well-informed choice regarding coverage available;

(3) breach of shipping contract in that the plaintiffs' household goods were damaged or lost during the shipment, subject to more than one loading and one unloading, and delayed delivery;

(4) breach of the implied covenant of good faith and fair dealing by failing to inform the plaintiffs of the terms and conditions of the RCP, by failing to notify plaintiffs of the reloading and delay in shipment of their goods, by intentionally failing to acknowledge communications regarding plaintiffs' claims, by not attempting in good faith to effectuate a prompt, fair and equitable settlement of plaintiffs' claims for loss and damage once liability had become reasonably clear, by failing to offer a proposed settlement within 120 days as required by regulations, by failing to adjust plaintiffs' claim in accordance with the defendants' own standard for fair and equitable settlement, by attempting to settle plaintiffs' claim for less than the amount to which a reasonable person would have believed he was entitled to based upon the oral and written representations of the defendant, by compelling the plaintiffs to institute litigation to recover amounts due under the RCP, by offering substantially less than the actual value of the claim and by engaging in bad faith litigation practices

to further wear down and wear out the plaintiffs;[2] and

(5) fraud in the withholding and falsifying of business records.[3]

Now, the defendants have moved, in what they style "in limine" motions, (1) to dismiss the plaintiffs' causes of action for negligent misrepresentation, breach of implied covenant of good faith and fair dealing and fraud on the ground that they are preempted by the Carmack Amendment; (2) to dismiss the plaintiffs' first cause of action based upon a violation of the informational requirements set out in 49 C.F.R. § 1056 since there exists no private right of action with respect to such a violation; (3) to strike the plaintiffs'

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[2] It should be noted that in granting the plaintiffs' motion to amend their complaint to include this cause of action, Chief Judge McCurn specifically held that this cause of action was not preempted by the Carmack Amendment. Id. at 17. Thus, that is the law of the case and that determination will not be disturbed.

[3] Chief Judge McCurn also held, with respect to this cause of action, that it was not preempted by the Carmack Amendment. Id. at 16-18 & n.11. As such, that determination will not be disturbed.

claim for punitive damages as not permitted under the law; and (4) to dismiss the plaintiffs' cause of action sounding in fraud for the withholding of business documents since there was a valid contract (bill of lading). Inasmuch as the resolution of these motions would have a tremendous impact upon the trial of this case, the plaintiff was requested to brief the issues for this court's determination. Thus, both parties have fully briefed the issues and the court is now prepared to rule thereon:

Discussion

The plaintiffs contend that the defendants' motion with respect to the preemption issue has already been decided by Chief Judge McCurn. However, since Chief Judge McCurn's consideration of this issue was prior to the time when it had been established that there existed a valid

bill of lading,[4] it is appropriate for this court to address the matter at this time.

I.
Preemption by the Carmack Amendment of Causes of Action Sounding in Negligent Misrepresentation (count 2), Breach of Implied Covenant of Good Faith and Fair Dealing (count 4) and Fraud (count 5)

As Chief Judge McCurn stated in his decision, "the majority view with respect to the preemptive scope of the Carmack Amendment is that the Amendment preempts state law claims for breach of contract and negligence." Id. at 8. In addition, Chief Judge McCurn held that the "plaintiffs' claim[] of ... negligent misrepresentation, to the extent that [it does] not seek to recover damages inconsistent with the Carmack Amendment, should not be dismissed as being preempted ..." Id. at 13. It is not necessary to reiterate here the legal

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[4] A Stipulation to which the parties now agree.

analysis performed to reach that conclusion. It is the law of the case and will not be disturbed here. Thus, the defendants' motion to dismiss the causes of action sounding in negligent misrepresentation is denied.

With respect to the breach of implied covenant of good faith and fair dealing, again, Chief Judge McCurn ruled that this cause of action was not preempted. The determination will not be disturbed and, therefore, the defendants' motion to dismiss this cause of action is denied.

With respect to the cause of action sounding in fraud, the result is the same, since Chief Judge McCurn Specifically held that this cause of action is not preempted by the Carmack Amendment. Thus, the defendants' motion to dismiss this cause of action is denied.

II.

Private Causes of Action for Violation of Requirements of 49 C.F.R. §§ 1056 et seq. (count 1)

The defendants also move to dismiss the first cause of action set out above, that being that due to the failure of the defendants to comply with the requirements set out in 49 C.F.R. § 1056 et seq., the plaintiffs were denied a meaningful choice of insurance coverage for their household goods and goods and belongings. The defendants contend that a review of these regulations reveals no private right of action for their violation, either express or implied. This issue was specifically not addressed by Chief Judge McCurn due to the lack of briefing on the issue. Id. at 13-14.

It is the plaintiffs' burden to show that there was intended such a private right of action. Sutor v. Artist M., ___U.S. ___, ___, 112 S. Ct. 1360, 1370,

118 L. Ed. 2d 1, ___(1992). In their response to this motion, the plaintiffs have cited neither caselaw nor express provision in the regulations or the statutory scheme providing for such a right of action. This court similarly, can find no support for such a cause of action.

Inasmuch as the regulations are enforced by the Interstate Commerce Commission, 49 U.S.C. § 11702(4); see Aero Mayflower Transit Co. v. I.C.C., 535 F.2d 997 (7th Cir. 1976), and inasmuch as the plaintiff has not satisfied its burden of demonstrating that there is such a private right of action, this court finds that no such private right of action is available. Thus, defendants' motion to dismiss is hereby with respect to this cause of action. However, as the plaintiffs have suggested in their memorandum of law on this point, they are not precluded from

introducing at trial facts relating to the violation of these regulatory provisions on the remaining caused of action which will be considered by the jury.

III.

Viability of Requested Punitive Damages

The defendants contend that the plaintiffs' punitive damage prayer for relief should be stricken inasmuch as there is no statutory nor common law right to punitive damages in the context of this case.

In this instance, the plaintiffs have not asserted their punitive damage claim as to the Carmack Amendment-affected causes of action, but rather on those that they allege are premised on general common law principles.[5]

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[5] It should be noted that the greater weight of authority has held that the Carmack Amendment does not preclude awards of punitive damages. See also Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224 (4th Cir. 1976); Sokhos v. Mayflower Transit,

Illustrative of the issue here presented is a case cited by the plaintiffs in opposition to this motion. In the case of Drucker v. O'Brien's Moving and Storage Inc., 745 F. Supp. 616 (D.Nev. 1990), aff'd 963 F.2d 1171 (9th Cir. 1992), the court held that punitive damages are available for a cause of action sounding in breach of obligation of fair dealing and good faith. See also Miller v. AACON Auto Transp., Inc., 447 F. Supp 1201 (S.D. Fla. 1978)(punitive damages are recoverable under federal common law when carrier acts with actual malice, recklessness or wanton indifference to plaintiff's rights). This is precisely the issue that is now presented to this court.

The defendants contend that it is the common law of New York that controls on this issue. However, as the court held in

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Inc., 691 F. Supp. 1578, 1581 (D. Mass. 1988). The Second Circuit haas yet to rule on this issue.

Drucker, the case deals with a federally regulated industry and it is federal common law that should control. As such, this court finds that punitive damages are available to the plaintiffs in this case.

IV.

Preclusion of Fraud Cause of Action Inasmuch as There is a Valid Bill of Lading (count 5)

Finally, the defendants have moved to dismiss the plaintiffs' final cause of action on the ground that since there now exists a lawful, valid bill of lading, the causes of action cannot be maintained under New York law. See U.S. Feast Telecommunications, Inc. v. U.S. West Info. Sys., Inc., 1991 WL 64461 (S.D.N.Y. 1991)(discussing law of New York).

As the plaintiffs point out in response to this motion, this is a cause of action not based upon the Carmack Amendment issues but rather upon facts that concern the

violation of the duty of honesty and fair dealing which was implicit in their contract with the defendants, as it is in every contract. Since the issue is one of the distinction of the two causes of action -- for breach of contract on the one hand, and for fraud on the other -- it is an issue that cannot be resolved at this juncture. The issue must await the trial of this matter at which the facts proven to the jury will determine whether the cause of action will survive. As such, the defendants' motion to dismiss this cause of action is denied with leave to renew at trial, if it is appropriate.

Conclusion

The defendants' motion to dismiss the plaintiffs' negligent misrepresentation, breach of implied covenant of good faith and fair dealing, and fraud causes of action on the ground that they are

preempted by the terms of the Carmack Amendment is hereby denied. The defendants' motion to dismiss the plaintiffs' cause of action relating to the violation of the requirements of 49 C.F.R. §§ 1056 et seq. is hereby granted, but the plaintiffs are hereby granted leave to delve into the underlying facts relating to these violations during the trial of this matter. The defendants' motion to strike the plaintiffs' demand for punitive damages is hereby denied. Finally, the defendants' motion to dismiss the plaintiffs' final cause of action alleging fraud in withholding and falsifying business records is denied; however, the defendants are granted leave to renew this motion at trial.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Plaintiffs,

-v- 89-CV-531

NORTH AMERICAN VAN LINES, and
BELTMAN NORTH AMERICAN CO., INC.,

Defendants.

U.S. District Court, Federal Courthouse
Broadway
Albany, New York 12207
April 29, 1992

STENOGRAPHIC MINUTES of a decision
rendered on a motion and cross-motion
in the above-entitled matter

BEFORE: HONORABLE FREDERICK J. SCULLIN, JR

APPEARANCES: OF COUNSEL:

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BY: DANIEL J. STEWART, ESQ.

RECORDED BY: BETH S. GOLDMAN, R.P.R.
Certified Shorthand Reporter

PROCEEDINGS

JUSTICE SCULLIN: This is in the matter of Cleveland Vs. Beltmann North American Co., North American Van Lines, 89-CV-531.

The Court and the parties are fully familiar with the background of this case, this litigation, so I don't need to discuss that any further.

By the present motion the defendants have moved on a number of different grounds for judgment as a matter of law regarding the awarding of fifty thousand dollars in punitive damages to the plaintiffs.

In the alternative, the defendants request a new trial on the issue of whether the plaintiffs were entitled to punitive damages as a result of the plaintiff's bad

faith tort in breaching the implied covenant of good faith and fair dealing.

The plaintiffs oppose the motion and have cross-moved to have the judgment in this action amended to include an award for pre- and post[judgment interest.

In support of this motion by the defendants, they contend that the Carmack Amendment preempts any claim of punitive damages and that, therefore, the plaintiffs may not recover these damages as a matter of law. However, this Court has already ruled in favor of the plaintiffs on this issue in the pretrial motion. Therefore, this Court's determination that plaintiff's claim for punitive damages is not preempted by the Carmack Amendment is the law of the case.

Defendants next contend that assuming that such claim has not been preempted, the law of the State of New York, rather than

Federal common law, must be applied in determining whether plaintiffs are entitled to such damages. They argue that the Court's failure to so find would "subvert the entire purpose of the Carmack Amendment and allow for punitive damages in every household goods case thereunder."

However, as with this Court's ruling concerning the availability of punitive damages in a claim brought pursuant to the Carmack Amendment, this Court has previously ruled that the plaintiffs could proceed with their claim seeking punitive damages for the bad faith tort of the breach of the implied covenant of good faith and fair dealing under federal common law. Therefore, this Court's ruling on such issue is the law in this case.

Defendants next contend that plaintiff's bad faith tort claim sounds in breach of contract, not in tort, and that New York

courts have not recognized the existence of a claim alleging bad faith tort of the breach of the implied covenant of good faith and fair dealing.

However, as noted above, this Court has previously ruled that federal common law, not the law of the State of New York governs the issue of whether the defendants breached the bad faith tort of the breach of the implied covenant of good faith and fair dealing.

I will cite the case of Drucker against O'Brien's Moving and Storage, Inc., 745 Fed. Supp., 616, 619, 622 District of Nevada, affirmed on other grounds, 693 Fed. 2d. 1171, 9th Circuit, 1992.

The defendants next argued that the Replacement Cost Protection (RCP) Plan purchased by the plaintiffs which obligated the defendants to compensate the plaintiffs for loss or damage to the property while in

the hands of the defendants was not insurance, but rather a valuation of plaintiffs' goods under the shipping contract.

They claim that their failure to pay the plaintiff's damages under this plan would, at most, amount to a breach of contract.

The defendants' argument continues by claiming punitive damages may only be awarded in breach of contract cases if a plaintiff proves that the defendant engaged in wrongful conduct which was directed at the public in general; conduct which they claim was not present in the case at bar. Even if this Court were to find the RCP plan to be the equivalent of insurance, defendants' claim that the plaintiffs failed to establish that the actions of defendants were so egregious as to warrant an award of punitive damages.

However, at the trial of this matter, this Court determined that the RCP plan was analogous to an insurance contract. New York Courts have upheld awarding of punitive damages in the context of insurance contracts. Cite: Gordon v. Nationwide Mutual Insurance, 30 New York 427, Court of Appeals. In order to prevail on a punitive damage claim in this context, a party must prove that the defendant acted, "with such morally culpable conduct and wanton dishonesty as to imply criminal indifference to their civil obligations."

That was the Charge that the Court gave to the Jury. And the jury in this case, after being instructed as to applicable law, determined that the plaintiffs were entitled to punitive damages.

A Court may grant judgment as a matter of law to a party under Rule 50(b) of the Federal Rules of Civil Procedure only where

movant's evidence is so overwhelming that a reasonable jury could have reached the opposite result, or when the Court determines that the jury's findings were the result of sheer surmise and conjecture. (County of Suffolk v. Long Island Lighting Company) 907 Fed.2d 1295, 1311, Second Circuit 1900)

In the present case, the defendants have failed to meet this heavy burden. The evidence heard by this Court indicates that a reasonable jury could have found for the plaintiffs on this claim. Additionally, the Jury's findings were not the result of sheer surmise ad conjecture. Thus, the jury's findings will not be disturbed by this Court.

Finally, the defendants argue that the Jury's determination that the plaintiffs suffered no compensatory damages for the breach of bad faith tort but were neverthe-

less entitled to $50,000 in punitive damages on this claim is inconsistent, because the jury's failure to award the plaintiffs compensatory damages demonstrates that the plaintiffs were not, in fact, injured by the defendants' allegedly wrongful conduct.

However, in the Court's instructions and in the jury verdict form, the jury was specifically instructed not to award compensatory damages to the plaintiffs regarding their bad faith tort claim if the jury had already compensated the plaintiffs for such damages under plaintiffs' Carmack claim. By not awarding plaintiffs additional compensatory damages under the bad faith tort claim, the jury merely prevented the plaintiffs form obtaining a double recovery on their claim for compensatory damages.

In light of the foregoing, the defendants' motion for judgment as a matter of law must be denied.

Defendants' motion for a new trial:

The defendants have moved for a new trial based upon the trial testimony of Donald Cleveland, wherein Donald Cleveland testified that he hired a private detective to "infiltrate" North American Van Lines in order to resolve a discovery dispute.

Despite the cautionary instruction given to the jury by the Court after this testimony, the defendants claim that "plaintiff's comments were so highly charged and prejudicial that they required a new trial on the issue of damages."

A motion for a new trial should not be granted unless the district court is convinced that the injury has reached a seriously erroneous result or the verdict is a miscarriage of justice, as in the case

of Niagara Mohawk Power Corp. et al, V. Stone & Webster Engineering Corp. et al., Fed. Supplement (N.D.N.Y. 1992) citing Hugh v. Jacobs, 961 Fed. 2d 359, 365, Second Circuit 1992.

In the instant action, the Court instructed the jury to disregard Mr. Cleveland's testimony immediately after this testimony was offered. The defendants have failed to establish that in finding for the plaintiffs on this issue the jury reached a seriously erroneous result or effectuated a miscarriage of justice against these defendants. Therefore, they are not entitled to a new trial on this basis.

Finally, defendants have moved for a new trial on their theory that the Court improperly reread testimony back to the jury regarding the defendants' abusive discovery tactics. They claim, as they did

at the time of trial, that Rule 11 provides the sole remedy for the plaintiffs and that it was improper to offer evidence of this conduct as support for an award of punitive damages against the defendants.

However, this Court has previously ruled against defendants on this issue when it denied defendants' motion in limine to preclude evidence in this nature from the trial. Thus, that ruling is the law of his case.

In light of the foregoing, defendants motion for a new trial must be denied.

Plaintiffs' cross-motion to amend the judgment, prejudgment interest: As I indicated, the Court is going to grant that. And I will cite the cased and reasoning for that. And I will also grant an amendment to include post-judgment interest. Upon receiving the submissions by the parties. I will then have a

decision as to that amount and the basis for that, okay.

(The reading of the decision in the above-entitled matter by the Court was concluded.)

CERTIFICATION

IN THE MATTER OF:
US District Court,Northern
District of New York

RE: Decision: Cleveland v. North
Beltmann, American Van Lines

AT: Federal Courthouse
Albany, New York 12207

ON: April 29, 1993

I, BETH S. GOLDMAN, Certified Shorthand Reporter, Registered Professional Reporter and Notary Pubic do hereby certify that the foregoing is a true and accurate transcription of the proceedings conducted in the above-entitled matter, to the best of my knowledge and belief.

Date: May 20, 1993

Beth S. Goldman
Certified Shorthand Reporter
Registered Professional Reporter

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Plaintiffs,

-v- 89-CV-531

NORTH AMERICAN VAN LINES, and
BELTMAN NORTH AMERICAN CO., INC.,

Defendants.

ORDER

No. 89-CV-531

Judge Scullin

The defendants, North American Van Lines, and Beltman North American Co., Inc. having duly moved for a order pursuant to Rules 50(b) and 59, FRCP, to alter and amend the verdict rendered in the above referenced case insofar as that verdict awarded $50,000 in punitive damages to plaintiffs, or in the alternative for a new

trial, and, the plaintiffs, Donald L. Cleveland and Christa A. Cleveland, having duly cross-moved for an order pursuant to Rule 59, FRCP, to alter or amend the judgment entered in the above referenced case insofar as that judgment failed to award pre-judgment interest, post-judgment interest and costs to plaintiffs, and upon the papers submitted in support of and in opposition to said motion and cross-motion, and after hearing the arguments of counsel in support of and in opposition to the defendants' motion and plaintiffs' cross-motion, it is hereby

ORDERED, that defendants' motion to alter and amend the judgment and, for judgment as a matter of law pursuant to Rule 50(b) and 59, FRCP and for a new trial is in all respects denied, and it is further

ORDERED, that the plaintiffs' cross-motion to alter and amend the judgment, pursuant to Rule 59, FRCP, to include pre-judgment interest, post-judgment interest and costs be granted in part, and it is further

ORDERED, that the clerk of the Court be and the same hereby is directed to enter judgment against the defendants and in favor of plaintiffs in the amount of $78,000 and it is further

ORDERED, that the clerk of the Court be and the same is hereby directed to enter judgment against defendants and in favor of plaintiffs for pre-judgment interest from August 30, 1988 to March 5, 1993 on the $28,000 compensatory award, pursuant to New York Civil Practice Law and Rules § 5001 and § 5004 at the statutory rate of nine (9) percent, in the amount of $11,371.07 and it is further

ORDERED, that the clerk of the Court be and the same hereby is directed to enter judgment against defendants and in favor of plaintiffs for post-judgment interest to be calculated from the date of the entry of the judgment and computed daily to the date of payment on the total jury verdict award of $78,000, pursuant to 28 U.S.C. § 1961 at the rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment: TO WIT: the treasury auction of March 4, 1993 at the interest rate of 3.21 percent, and it is further

ORDERED, that the clerk of the Court be and the same hereby is directed to enter judgment against the defendants, and in favor of plaintiffs for plaintiffs' costs

in this action pursuant to Rule 54(d), FRCP.

/s/

DATED: 5/14/93

Honorable
Frederick J. Scullin

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Plaintiffs,

-v- 89-CV-531

NORTH AMERICAN VAN LINES, and
BELTMAN NORTH AMERICAN CO., INC.,

Defendants.

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Frederick J. Scullin, Jr., D.J.:

DECISION AND ORDER

INTRODUCTION

This matter is before the court on submission on defendants North American Van Lines, Inc. and Beltman North American Co., Inc. motion for review of the bill of costs entered on January 12, 1994 by the Clerk of the Court for the Northern District of New York in favor of plaintiffs Donald L. Cleveland and Christa A. Cleveland in the amount of $4,736.51.

DISCUSSION

1. Legal Standard

Federal Rule of Civil Procedure 54(d) states that costs are "allowed as of course" to the prevailing party. See Fed.R.Civ.P. 54(d). However, a district court must limit reimbursement of costs to the list of items specifically set out in 28 U.S.C. § 1920 or some other explicit statutory contractual authorization. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494, 2496 (1987).

28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as cost the following:
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursement for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Id.

The defendants do not dispute that the plaintiffs are the prevailing party and as such may recover costs. Rather the defendants argue that some of the costs listed in plaintiffs' bill of costs are not authorized by 28 U.S.C. § 1920.

A. Expert Witness Fees

Plaintiffs submitted a total amount of $1,702.20 for expert witness fees. Under

28 U.S.C. § 1920(3) a prevailing party may recover expert witness fees. However, where an expert is to court-appointed, reimbursement is limited to a $40.00 witness fee and up to $75.00 for travel costs. See 28 U.S.C. § 1821; Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U. S. 437, 107 S.Ct. 2494, 2496 (1985). Plaintiffs concede this point.

B. Deposition Fees

Plaintiffs submitted a total amount of $2,062.29 for deposition fees. Pursuant to 28 U.S.C. § 1920(3), deposition expenses may be recovered if reasonably necessary at the time taken. See Health-Chem Corp. v. Hyman, 523 F.Supp. 27, 33 (S.D.N.Y. 1981). The circumstances of this case lead this Court to believe that the costs incurred for Erenberg and Hofer excerpts were properly taken within the bounds of discovery and therefore necessarily

obtained for use in the case. However, postage and handling charges are not provided for in 28 U.S.C. § 1920 and such costs are disallowed.

C. Photographic Fees

Plaintiffs submitted a total amount of $636.06 for photographic exhibits prepared for use at trial in this case. Defendants contend that a second bill submitted for reprints of $225.64 is duplicative of an earlier bill of $207.58. 28 U.S.C. § 1920(4) permits recovery for the cost of exhibits prepared for use at trial. The two bills submitted do not reflect duplication, the amounts seem reasonable, and without more than a bald assertion of duplication by the defendants, this Court shall award $636.06 for these costs.

D. Docket Fees

Plaintiffs request that pursuant to 28 U.S.C. § 1920(5) the Court include the

$20.00 amount paid for trial fees which was inadvertently excluded from the original bill of costs. The Court finds that pursuant to 28 U.S.C. § 1923 this cost is recoverable.

CONCLUSION

For the reasons just given, the Court finds that plaintiffs incurred recoverable costs in the amount of $180.00 for fees of the clerk and marshal, $27.50 for docket fees, $460.00 for expert witness fees, $784.52 for trial exhibits, and $2,018.29 or deposition fees. The plaintiffs' costs total $3,470.31. The Court will vacate plaintiffs' original bill of costs and order the Clerk of Court to enter a judgment for plaintiffs and against the defendants for costs in the amount of $3,470.31.

ACCORDINGLY,

(1) defendants' motion for review of the Clerk's taxation of costs, filed on January 18, 1994, is granted in part and denied in part;

(2) the Clerk of the Court shall enter a judgment for the plaintiffs and against the defendants for costs in the amount of $3,470.31, and;

(3) plaintiffs' original bill of costs is hereby vacated.

IT IS SO ORDERED.

DATED: March 28, 1994
SYRACUSE, NEW YORK

/s/

Frederick J. Scullin, Jr.

Supreme Court, U.S.
FILED
DEC 20 1994
OFFICE OF THE CLERK

No. 94-768

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DONALD L. CLEVELAND and CHRISTA A. CLEVELAND,
Petitioners,

v.

BELTMAN NORTH AMERICAN CO., INC. and
NORTH AMERICAN VAN LINES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that the Carmack Amendment to the Interstate Commerce Act of 1887 precludes an award of punitive damages under a shipper's federal common law claim for breach of the implied covenant of good faith and fair dealing.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to this action are Donald L. Cleveland and Christa A. Cleveland, Petitioners; and Beltman North American Co., Inc. and North American Van Lines, Respondents. The list of affiliates required by Supreme Court Rule 29.1 can be found in the attached Appendix.

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IN THE

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DONALD L. CLEVELAND and CHRISTA A. CLEVELAND,
Petitioners,

v.

BELTMAN NORTH AMERICAN CO., INC. and
NORTH AMERICAN VAN LINES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Beltman North American Co., Inc. and North American Van Lines hereby oppose the petition for a writ of certiorari to review the judgment of the court of appeals in this case.

STATEMENT OF THE CASE

This case involves a married couple whose household belongings were damaged while being transported from Iowa to New York by respondents. A jury awarded the couple $28,000 in actual damages for the loss, as authorized by the Carmack Amendment to the Interstate Commerce Act of 1887. The jury also awarded $50,000 in punitive damages for breach of the implied covenant of good faith based upon federal common law. The Second Circuit reversed the district court's award of punitive dam-

ages as inconsistent with the Carmack Amendment itself. Petitioners subsequently filed the instant petition for a writ of certiorari.

1. In August 1988, petitioners Donald and Christa Cleveland moved from West Des Moines, Iowa, to Slingerlands, New York, a suburb of Albany. To transport their household goods and personal belongings, the Clevelands hired respondent North American Van Lines ("North American") and its local agent in Des Moines, respondent Beltman North American Co., Inc. ("Beltman"). Both are motor common carriers under the Interstate Commerce Act. 49 U.S.C. § 10102(4).

As is standard practice, the Clevelands and the carriers executed a shipping contract, known as a bill of lading. The Clevelands purchased protection, incorporated into the bill of lading, which provided for the repair, replacement or 100 percent reimbursement at current prices without depreciation for any goods damaged or lost during transport, up to a total recovery of $50,000. Pet. App. A4.

Beltman picked up the Clevelands' possessions on August 19, 1988. Because the driver who was scheduled to transport the goods to New York was unable to work due to family illness, the trailer containing the Clevelands' belongings was separated from its original tractor and was left in Beltman's lot in Des Moines to await another driver. When a new driver was found, the goods were loaded into a different van. *Id.* at A4-A5.

En route to New York, the moving van's fifth wheel broke through the truck's floor, which ultimately caused damage to petitioners' property. On August 30, 1988, the shipment arrived in Slingerlands, New York, several days late. At this time, the Clevelands realized that many of their belongings had been damaged. *Id.* at A5.

On September 13, 1988, the Clevelands made a timely claim for delay and actual damage to their possessions.

Later, upon noticing that additional items were missing, the Clevelands filed a supplemental claim for loss. North American promptly paid for the delay. Resolution of the damage and loss claim proceeded less smoothly. In February 1989, North American offered to settle the Clevelands' claim, and the Clevelands rejected the offer. *Id.* at A6.

2. The Clevelands filed the instant action in United States District Court for the Northern District of New York, asserting several causes of action. The district court submitted three theories of liability to the jury: (1) a claim for loss and damage to property under the Carmack Amendment, (2) a claim for negligent misrepresentation of the terms and conditions of the protection plan, and (3) a tort claim for punitive damages based on a common law theory of breach of an implied covenant of good faith and fair dealing in the handling of the petitioners' move and the processing of their loss and damage claim. *Id.* at A8. Because it was unable to determine what the standard for the tort claim should be, the court borrowed the New York standard for breach of an insurance contract, instructing the jury that it could award punitive damages if "defendants acted with such morally culpable conduct and wanton dishonesty so as to imply a criminal indifference to their civil obligations under the contract to transport [the Clevelands'] household goods." *Id.* at A9.

The jury found for North American on the negligent misrepresentation claim. However, it awarded petitioners $28,000 in compensatory damages under the Carmack Amendment claim and $50,000 in punitive damages for breach of the implied covenant of fair dealing. The district court entered a judgment confirming the jury award on March 8, 1993.

The court of appeals affirmed in part, but reversed the district court's award of punitive damages. The court stated that "it is plain that a claim for breach of the implied covenant of good faith and fair dealing cannot exist alongside the Carmack Amendment." *Id.* at A16.

REASONS WHY THE PETITION SHOULD BE DENIED

In this case, the district court took the unprecedented step of awarding punitive damages under the Carmack Amendment for a federal common law "breach of an implied covenant of good faith and fair dealing." The Second Circuit properly reversed. The issue raised by petitioners—whether the Second Circuit was correct in holding that the Carmack Amendment precludes a federal court from awarding punitive damages for a carrier's violation of a federal common law tort—does not warrant review by this Court. In urging this Court to consider the issue, petitioners cannot demonstrate that any of the traditional reasons for granting certiorari exist. The ruling below is in accord with all the circuits that have ruled on the issue, and it properly follows decisions of this Court. Moreover, the issue is not one of pressing or recurring importance. Earlier this century, the Court issued a number of decisions that delineated the nature and scope of the Carmack Amendment. Based on those opinions, more modern case law reveals no conflict regarding the Amendment's broad preemptive force that warrants the attention of this Court.

1. Petitioners argue (Pet. 24-33) that the decision below conflicts with decisions in the Fourth and Tenth Circuits. Not only is there no circuit split, but both the Fourth and Tenth Circuits hold that punitive damages are unavailable in a case such as the petitioners' that involves a claim based on damage to goods in transit.

The Fourth Circuit has squarely held that the Carmack Amendment prohibits a shipper from recovering punitive damages under the precise common law theory followed by the petitioners here. *Chandler* v. *Aero Mayflower Transit Co.*, 374 F.2d 129, 137 (4th Cir. 1967). Thus, if the instant action had been brought in the Fourth Circuit, petitioners' claim for punitive damages would have been dismissed.

To attempt to create a split with the Fourth Circuit, petitioners rely upon *Hubbard* v. *Allied Van Lines, Inc.*,

540 F.2d 1224 (4th Cir. 1976). *Hubbard* considered an action for breach of a specific duty, *viz.*, the duty of nondiscrimination imposed by the Interstate Commerce Act itself. 45 U.S.C. § 316(d). Although the court in *Hubbard* left open the possibility of punitive damages in that instance (a questionable holding in its own right), the panel expressly distinguished *Chandler* and preserved the Carmack Amendment's prohibition on punitive damages in common law actions brought against carriers arising out of injury to property. 540 F.2d at 1229. *Hubbard* by its own terms does not speak to the circumstances of the instant case.

The Tenth Circuit, in its case most applicable to the one at bar, held earlier this year that the Carmack Amendment precludes an award of punitive damages for the intentional violation of a regulated railroad's duty to maintain service on reasonable request. *Overbrook Farmers Union Co-op Ass'n* v. *Missouri Pac. R.R.*, 21 F.3d 360, 364 (10th Cir. 1994). The petitioners' suggestion that *Overbrook Farmers* somehow opens the door to punitive damage awards arises from one sentence of rhetorical dicta. After stating flatly that only compensatory damages are available, the panel underscored its result by noting that even if punitive damages were available in egregious cases, it would not award punitive damages in the case before it. *Id.* Petitioners' partial quotation from this argument in the alternative (Pet. 29-30), manifestly does not create a circuit split.

The earlier Tenth Circuit cases petitioners cite are irrelevant to the punitive damages issue in this case. In *Underwriters at Lloyds of London* v. *North American Van Lines*, 890 F.2d 1112, 1113 (10th Cir. 1989) (en banc), the court held that the Carmack Amendment preempts all state common law remedies. Nothing in that decision indicates that a shipper can obtain any legal or equitable remedies apart from those in the text of the Interstate Commerce Act itself. *Underwriters* expressly overruled the circuit's earlier decisions in *Litvak Meat Co.* v. *Baker*,

446 F.2d 329 (10th Cir. 1971), and *Reed* v. *AAACON Auto Transport, Inc.*, 637 F.2d 1302 (10th Cir. 1981). 890 F.2d at 1121. Therefore, *Litvak* and *Reed* provide no support for the petitioners' contention that a circuit split now exists.[1]

Finally, the Tenth Circuit has held that the Carmack Amendment does not preempt a state law award of reasonable attorney's fees to a shipper because such fees are "incidental" to the substance of a lawsuit. *A.T. Clayton & Co.* v. *Missouri-Kan.-Tex. R.R.*, 901 F.2d 833, 835 (10th Cir. 1990). However, the claim in *A.T. Clayton* was created by the Carmack Amendment itself, *id.* at 833, and therefore the decision does not support the proposition that the Amendment authorizes punitive awards based upon state or federal common law claims. Clearly, as the court below held, the federal common law tort applied here and the award of punitive damages are not merely incidental to a shipper's rights and remedies. These are awards that dramatically "enlarge a shipper's remedy." Pet. App. A15.[2]

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[1] In any event, *Litvak* held only that, even though the Carmack Amendment preempts state law, a shipper nevertheless can maintain a state law negligence action if it is "based exclusively on the holder of a receipt or a bill of lading issued by a common carrier, *qua* holder[.]" 446 F.2d at 337. *Reed* applied the law of the State of New Mexico to allow a shipper to recover punitive damages. 637 F.2d at 1307. Neither case is concerned with federal common law.

[2] The three district court cases petitioners cite are only minimally relevant and clearly provide no basis for this Court's review of the holding below. The court in *Drucker* v. *O'Brien's Moving & Storage Inc.*, 745 F. Supp. 616, 622-23 (D. Nev. 1990), awarded punitive damages for a federal common law violation by a shipper. The reported decision in that case, a transcript of the judge's decision from the bench, cites no authority except for two cases that describe the general nature of federal common law. Likewise, *Wright* v. *Chicago, Burlington & Quincy Railroad*, 223 F. Supp. 660, 662 (N.D. Ill. 1963), provides no analysis in awarding punitive damages for a violation of a Carmack Act provision, and there is no indication in *Wright* that the carrier even argued that the exemplary

Petitioners do not even claim that any other circuit has addressed the issue here. If, as petitioners assert, "[a] considerable number of cases are pending in district and circuit courts which turn on the resolution of the issues presented in this case" (Pet. 45), this Court should allow the lower courts to develop the case law further and to permit a conflict among the circuits to materialize (if indeed one ever does) before granting certiorari.

2. Petitioners argue (*id.* at 33-38) that the Second Circuit misapplied this Court's decisions in *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913), and *Missouri, Kansas & Texas Railway* v. *Harris*, 234 U.S. 412 (1914). In fact, however, the decision below faithfully follows these and other precedents.

a. In the leading case of *Adams Express Co.*, this Court held that, in enacting the Carmack Amendment, Congress meant to preempt all state law and regulation concerning a carrier's liability to a shipper for the interstate shipment of property. 226 U.S. at 505-08. The decision emphasizes and relies upon Congress' intent to create a broad, uniform legal code to dispose of claims brought under a bill of lading. The Second Circuit directly applied this reasoning in concluding that neither a federal common law claim for breach of the implied covenant of good faith and fair dealing nor a corresponding punitive damages award could exist alongside the regulatory scheme set up by Congress. Pet. App. A16.

The Court in *Missouri* also recognized the Amendment's broad preemptive force, 234 U.S. at 417, 420, but nevertheless held that attorney's fees may be awarded pursuant to state statute because such fees (ten dollars in the *Missouri* case) "do[] not in anywise either enlarge or limit the responsibility of the carrier" and "only inci-

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award was improper. *Miller* v. *AAACON Auto Transport, Inc.*, 447 F. Supp. 1201, 1205 (S.D. Fla. 1978), does not award punitive damages, though it states in *dicta* that "punitive damages might be recoverable under federal common law[.]"

dentally affect[]" the federal statutory remedy. *Id.* at 420.[3] The Second Circuit found that, in sharp contrast, the new "breach of implied covenant tort" and the award of punitive damages "could have a dramatic impact on a carrier's liability and seriously enlarge a shipper's remedy." Pet. App. A15. Because new liability and punitive damages affect carrier liability to a much greater extent than do attorneys' fees for existing liabilities, the Second Circuit correctly applied *Missouri.*

b. Petitioners argue (Pet. 38-43) that even though the Carmack Amendment is so broad that it preempts state common law, it nevertheless is not powerful enough to preempt federal common law. Such reasoning turns this Court's case law on its head. In *Milwaukee* v. *Illinois and Michigan*, 451 U.S. 304 (1981), the Court held that even though the 1972 Amendments to the Federal Water Pollution Control Act preserved certain state law remedies, the Amendments nevertheless preempted a federal common law nuisance action. This Court explained that federal common law is far easier to preempt than is state law:

> In considering [preemption of state law,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

451 U.S. at 316-17 (citations and quotations omitted); *see also Middlesex County Sewerage Auth.* v. *National*

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[3] Attorney's fee awards under the Amendment are now governed explicitly by 49 U.S.C. § 11711(d).

Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981) (holding that federal statutes allow no federal common law action for damage to fishing grounds caused by sewage discharge) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"). In the instant case, where the Carmack Amendment displaces all of state common law in the field of carrier liability, the Second Circuit was correct in holding that it displaced federal common law as well.

With the enactment of the Carmack Amendment, "there can be no rational doubt but that *Congress* intended to take possession of the subject." *Adams*, 226 U.S. at 505-06 (emphasis added). The express terms of the Amendment, passed in 1906, have remained in force for decades without courts grafting onto the statute a federal common law tort action for "breach of an implied covenant of good faith and fair dealing," with corresponding punitive damages. Whatever the policy merits of enacting such a federal tort in the first instance, this Court's precedents leave no doubt that the decision whether to adopt this remedy is for Congress, not courts, to make.

c. Petitioners seize upon language in *Adams* and argue that the Amendment preserves federal common law remedies. See Pet. 36. But that argument relies upon language taken out of its historical context. *Adams* pre-dated this Court's seminal decision in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). When *Adams* was decided, under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842), federal courts were allowed to develop a "general federal common law" that superseded state common law in federal suits. However, *Erie* overruled *Swift*, with the Court's celebrated statement that "[t]here is no federal general common law." 304 U.S. at 78. Thus, *Adams* dicta hardly serves as a basis for further review by this Court of a decision not to expand federal common law remedies

beyond anything heretofore recognized by any federal court.[4]

3. The Carmack Amendment effectively vindicates shippers' interests, making further judicial amendment to the Interstate Commerce Act unnecessary. Prior to 1906, it was difficult for a shipper to know where to file a claim for damage or loss that occurred during an interstate shipment. With the passage of the Amendment, the originating carrier must issue a bill of lading under which it is liable to the shipper for the full, actual loss or damage to the property. The Amendment in effect makes the originating carrier responsible for the protection of the property in its possession, with the exception of a few events beyond the carrier's control. See generally *New York, Phila. & Norfolk R.R.* v. *Peninsula Produce Exch.*, 240 U.S. 34, 37-39 (1916).

The Amendment has been interpreted broadly to provide remedies for all actual or consequential damages that a shipper suffers. For instance, *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28 (1936), dealt with a suit to recover damages for failure to deliver a motion picture in time to be exhibited as advertised. Though there was no damage to the film in transit, the Court held that the shipper could recover all damages from the interruption of its business. The Amendment is

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[4] The overriding policy consideration embodied in the Carmack Amendment as recognized by this Court in *Adams* was the importance of uniform remedies nationwide. *Adams Express Co.*, 226 U.S. at 506. But the federal common law that exists post-*Erie* inherently lacks uniformity because it borrows the proper legal standard from the state in which the transaction occurred, which is what the district court purported to do in this case. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). Thus, the Amendment as interpreted would "destroy itself" if petitioners' federal common law theory were valid. *Adams*, 226 U.S. at 507. Accordingly, it is extremely unlikely that the Court's dictum retains any vitality after *Erie*, and, in any event, it clearly has not been followed by any other court that has addressed the issue.

"comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty. . . ." *Id.* at 29 (quoting *Georgia, Fl. & Ala. Ry.* v. *Blish Co.*, 241 U.S. 190, 196 (1916)).

Congress has given the Interstate Commerce Commission the power to promulgate and enforce regulations pertaining to the transportation of household goods by motor common carrier. See 49 U.S.C. §§ 11110(a)(2), 11702(a)(4). These powers extend to protecting individual shippers, such as petitioners. 49 U.S.C. § 11110(a)(3). Indeed, the ICC has power to revoke or suspend the license of a carrier found to have violated its obligations under the Interstate Commerce Act as interpreted by the ICC. 49 U.S.C. §§ 10925, 11701. There is therefore no need for a court-created remedy to punish carriers found to have violated their basic duties in carrying household goods for shippers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

North American Van Lines is a subsidiary of Norfolk Southern Corporation, which has the following consolidated (more than 50% owned) subsidiaries: Agency Media Services, Inc.; Atlantic Investment Company; Lamberts Point Barge Company, Inc.; Norfolk Southern Properties, Inc.; Norfolk Southern Railway Company; North American Van Lines, Inc.; NS Crown Services, Inc.; NS Fiber Optics, Inc.; NS Transportation Brokerage Corporation; Pocahontas Development Corporation; Pocahontas Land Corporation; and TCS Leasing, Inc.

Norfolk Southern Railway Company subsidiaries include the following: Airforce Pipeline, Inc.; Alabama Great Southern Railroad Company, Atlanta and Charlotte Air Line Railway Company; Atlantic and East Carolina Railway Company; Camp Lejeune Railroad Company; Central of Georgia Railroad Company; Chesapeake Western Railway; Cincinnati, New Orleans and Texas Pacific Railway Company; Citico Realty Company; Elberton Southern Railway Company; Georgia Midland Railway Company: Georgia Southern and Florida Railway Company; High Point, Randleman, Asheboro and Southern Railroad Company; Interstate Railroad Company; Memphis and Charleston Railway Company; Mobile and Birmingham Railroad Company; Norfolk and Portsmouth Belt Line Railroad Company; Norfolk and Western Railway Company; North Carolina Midland Railroad Company; Rail Investment Company; Richmond-Washington Company; Shenandoah-Virginia Corporation; Southern Western Rail Road Company; Southern Rail Terminals, Inc.; Southern Rail Terminals of North Carolina, Inc.; Southern Railway-Carolina Division; Southern Region Coal Transport, Inc.; Southern Region Materials Supply, Inc.; Southern Region Motor Transport, Inc.; State University Railroad Company; Tennessee, Alabama & Georgia Railway Company; Tennessee Railway Company; Toledo Belt Railway Company; Virginia and Southwestern Railway Company; and Yadkin Railroad Company.

Norfolk Southern Properties, Inc. subsidiaries include the following: Alexandria-Southern Properties, Inc.; Arrowood-Southern Company; Arrowood Southern Executive Park, Inc.; Carlyle CA Corporation; Carlyle Development Corporation; Charlotte-Southern Corporation; Charlotte-Southern Hotel Corporation; Lambert's Point Docks, Incorporated; NS-Charlotte Tower Corporation; Nickel Plate Improvement Company, Inc.; Norfolk Southern Industrial Development Corp.; Sandusky Dock Corporation; Southern Region Industrial Realty, Inc.; and Virginia Holding Corporation.

Northern American Van Lines, Inc., domestic subsidiaries include the following: A Five Star Forwarding, Inc.; A Three Rivers Forwarding, Inc.; Alaska USA Van Lines, Inc.; Americas Quality Van Lines, Inc.; City Storage & Transfer, Inc.; Fleet Insurance Management, Inc.; Front-Runner Worldwide, Inc.; Great Falls North America, Inc.; NACAL, Inc.; NALOG, Inc.; NAVTRANS Container Lines, Inc.; NAVTRANS International Freight Forwarding, Inc.; NorAm Forwarding, Inc.; North American Distribution Systems, Inc.; North American Forwarding, Inc.; North American Logistics, Ltd.; North American Moving & Storage, Inc.; North American Tarnsport Insurance Co.; North American Van Lines of Texas, Inc.; and Relocation Management Systems, Inc.

North American Van Lines, Inc., foreign subsidiaries include the following: Cavalier Moving & Storage Co., Ltd.; Cold Lake Moving & Storage Ltd.; Curry Moving & Storage Ltd.; Midi-Data Speditions GmbH; NAVPAN, S.A.; NAVTRANS International Speditions GmbH; North American Van Lines Ltd.; North American Van Lines Canada Ltd.; North American Van Lines (Alberta) Ltd.; North American Van Lines (Atlantic) Ltd.; Star Storage Ltd.; Tru-Flite Transportation Systems Inc.; Westlake Moving & Storage, Ltd.; Westmont Moving & Storage, Inc.; and 153843 Canada, Inc.